No. 01-687-CFY

Title: United States, Petitioner
v.
Leonard Cotton, Marquette Hall, Lamont Thomas, Matilda Hall, Jovan Powell, Jesus Hall, and Stanley Hall, Jr.

Docketed:
November 13, 2001

Court: United States Court of Appeals for the Fourth Circuit

Entry	Date	Proceedings and Orders
	Oct 31 2001	Petition for writ of certiorari filed. (Response due December 13, 2001)
	Dec 7 2001	Brief of respondents Leonard Cotton, et al. in opposition filed.
	Dec 7 2001	Motion of respondents for leave to proceed in forma pauperis filed.
	Dec 12 2001	DISTRIBUTED for Conference of January 4, 2002
	Dec 12 2001	Brief of National Association of Criminal Defense Lawyers, et al. filed.
	Dec 18 2001	Reply brief of petitioner United States filed.
	Dec 19 2001	REDISTRIBUTED for Conference of January 4, 2002
	Jan 4 2002	Motion of respondents for leave to proceed in forma pauperis GRANTED.
	Jan 4 2002	Petition GRANTED. SET FOR ARGUMENT April 15, 2002. **********
	Feb 19 2002	Joint appendix filed.
	Feb 19 2002	Brief of petitioner United States filed.
	Mar 8 2002	CIRCULATED.
	Mar 11 2002	Record filed.
	Mar 21 2002	Brief of respondents Leonard Cotton, et al. filed.
	Mar 21 2002	Brief amici curiae of National Association of Criminal Defense Lawyers,et al. filed.
	Apr 8 2002	Reply brief of petitioner United States filed.
	Apr 10 2002	LODGING consisting of twenty copies of transcript material submitted by the Solicitor General and distributed. Ten copies of tape recording of the above hearing received.
	Apr 15 2002	ARGUED.

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Supreme Court, U.S.
FILED
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No.

In the Supreme Court of the United States

UNITED STATES OF AMERICA, PETITIONER

v.

LEONARD COTTON, MARQUETTE HALL, LAMONT THOMAS, MATILDA HALL, JOVAN POWELL, JESUS HALL, AND STANLEY HALL, JR.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the omission from a federal indictment of a fact that enhances the statutory maximum sentence requires a court of appeals automatically to vacate the enhanced sentence, notwithstanding that the defendant did not object to the sentence in the district court, the government introduced overwhelming proof of the fact that supports the enhanced sentence, and the defendant had notice that the fact could be used to seek an enhanced sentence.

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

The Solicitor General, on behalf of the United States of America, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit in this case.

OPINION BELOW

The opinion of the court of appeals (App., *infra*, 1a-35a) is reported at 261 F.3d 397.

JURISDICTION

The judgment of the court of appeals was entered on August 10, 2001. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. The Fifth Amendment to the United States Constitution provides, in pertinent part:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury * * *.

2. The relevant provisions of Sections 841 and 846 of Title 21 of the United States Code are reproduced at App., *infra*, 36a-47a.

STATEMENT

1. In October 1997, a federal grand jury in the District of Maryland returned an indictment charging respondents and others with conspiring between February 1996 and May 1997 to distribute and to possess with the intent to distribute 5 kilograms or more of cocaine and 50 grams or more of cocaine base, in violation of 21 U.S.C. 846 and 841(a)(1). 1 C.A. App. 71-72. A superseding indictment returned in March 1998 extended the time period of the conspiracy to December 1997 and added five more defendants. The superseding indictment charged a conspiracy to distribute and to possess with the intent to distribute a "detectable amount" of cocaine and cocaine base, without alleging that any specific or threshold amounts of drugs were involved in the conspiracy. 1 C.A. App. 85-86. At their arraignments on both indictments, respondents were informed that the maximum penalty for the conspiracy offense was life imprisonment. Gov't C.A. Br. 45.

2. The evidence at trial established that respondents operated a drug trafficking organization that distributed substantial quantities of cocaine and cocaine base (also known as crack cocaine) in Baltimore, Maryland.

The organization was headed by respondent Stanley Hall, Jr. The organization purchased cocaine in kilogram quantities from a dealer in New York City, manufactured it into crack cocaine, and bagged it for distribution to dealers who sold the drugs to their customers. The government's witnesses included, in addition to cooperating co-conspirators, a number of FBI agents and Baltimore police officers, who testified about undercover drug purchases, arrests and searches of members of the conspiracy, and searches of their residences. That testimony established that the arrests and searches resulted in the seizure of approximately 380 grams of cocaine base, as well as cocaine, drug paraphernalia, firearms, and currency. App., *infra*, 3a, 6a; Gov't C.A. Br. 4-28.

The district court instructed the jury that it could find the defendants guilty if it found beyond a reasonable doubt that they conspired to distribute and possess with intent to distribute "cocaine hydrochloride and cocaine base," but that it "need not be concerned with the quantities." The court added that "as long as you find that a defendant conspired to distribute or possess[] with intent to distribute these controlled substances, the amounts involved are not important." Supp. C.A. App. 8, 13; see App., *infra*, 6a. The jury found the seven respondents guilty. App., *infra*, 3a.[1]

3. The district court sentenced respondents pursuant to the graduated penalties set forth in 21 U.S.C. 841(b). As relevant here, Section 841(b)(1)(A) pre-

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[1] In addition, the jury found defendant Darlene Green guilty and found defendant Roger Evans not guilty. App., *infra*, 3a-4a & n.1. The 15-year sentence imposed on Darlene Green was left intact by the court of appeals and is not affected by the question raised in this petition. See *id.* at 7a.

scribes "a term of imprisonment which may not be * * * more than life" for drug offenses involving at least 5 kilograms of cocaine or at least 50 grams of cocaine base. Section 841(b)(1)(C), however, prescribes "a term of imprisonment of not more than 20 years" for drug offenses involving any detectable quantity of a Schedule II controlled substance, such as cocaine or cocaine base.

The district court found, based on the trial testimony, that respondent Matilda Hall was responsible for at least 500 grams of cocaine base, and that the other respondents were each responsible for at least 1.5 kilograms of cocaine base. Applying the Sentencing Guidelines, the court sentenced respondents Matilda Hall and Jovan Powell to terms of 30 years' imprisonment, and the other respondents to terms of life imprisonment. App., *infra*, 3a-4a.

4. On appeal, respondents argued that their sentences were invalid under *Apprendi* v. *New Jersey*, 530 U.S. 466 (2000), because drug quantity was not alleged in the superseding indictment or proved to the jury beyond a reasonable doubt. The court of appeals vacated respondents' sentences and remanded for resentencing to terms of not more than 20 years' imprisonment. App., *infra*, 7a-16a.

Because respondents had not raised an *Apprendi* claim in the district court, the court of appeals held that the claim was reviewable under the plain-error standard. App., *infra*, 7a-8a. Under that standard, an appellate court may correct an error not raised below only if the error is "plain," "affect[s] substantial rights," and "seriously affect[s] the fairness, integrity or public reputation of judicial proceedings." *United States* v. *Olano*, 507 U.S. 725, 731, 732 (1993); see Fed. R. Crim. P. 52(b); see also App., *infra*, 8a (citing *Olano*).

The court of appeals noted that it had previously held in *United States* v. *Promise*, 255 F.3d 150 (4th Cir. 2001) (en banc), petition for cert. pending, No. 01-6398 (filed Sept. 20, 2001), that "because drug quantity 'must be treated as an element of an aggravated drug trafficking offense' under 21 U.S.C. § 841, the failure to charge a specific threshold drug quantity in the indictment and to submit the quantity issue to the jury constitutes plain error." App., *infra*, 8a (quoting *Promise*, 255 F.3d at 156). *Promise* also concluded that an indictment error under *Apprendi* affects a defendant's substantial rights whenever the defendant receives a term of imprisonment greater than that authorized by Section 841(b)(1)(C) for offenses involving any detectable quantity of drugs. The *Promise* court had not resolved, however, whether the indictment error "'seriously affect[s] the fairness, integrity or public reputation of judicial proceedings,' so that we should exercise our discretion to recognize the error." *Ibid.* The court in this case "answer[ed] that question in the affirmative." *Ibid.*

The court of appeals, citing *Ex parte Bain*, 121 U.S. 1 (1887), and *Stirone* v. *United States*, 361 U.S. 212 (1960), held that "an indictment setting forth all the essential elements of an offense is both mandatory and jurisdictional." App., *infra*, 10a. Accordingly, the court concluded that "the district court exceeded its jurisdiction in sentencing [respondents] for a crime with which they were never charged, thus depriving them of the constitutional right to 'answer' only for those crimes presented to the grand jury." *Id.* at 11a. The court also noted that in *Silber* v. *United States*, 370 U.S. 717 (1962) (per curiam), the Court reversed the defendant's conviction when the indictment had omitted an offense element, even though the defendant had not raised the

error in either the court of appeals or this Court. App., *infra*, 12a-13a. "Likewise," the court stated, "*sentencing* a defendant for an unindicted crime also seriously affects the fairness, integrity or public reputation of judicial proceedings." *Id.* at 14a.

The court of appeals rejected the government's argument that the indictment error did not warrant reversal under the plain-error standard, because the evidence overwhelmingly established that respondents' offenses involved the 50 grams of cocaine base needed to support their sentences under 21 U.S.C. 841(b)(1)(A)(iii). The court held that the strength of the evidence was "not a relevant consideration" in determining whether to reverse a sentence based on an omission from the indictment. App., *infra*, 15a. The court reasoned that "a reviewing court may not speculate about whether a grand jury would or would not have indicted a defendant for a crime with which he was never charged," and that to do so would "usurp the role of the grand jury" and "result in nothing less than a constructive amendment of the indictment, * * * which itself is reversible plain error." *Id.* at 15a, 16a.

Chief Judge Wilkinson dissented in part. App., *infra*, 23a-35a. Relying on *Johnson* v. *United States*, 520 U.S. 461, 469-470 (1997), he concluded that respondents could not satisfy the fourth, discretionary prong of the plain-error test. He noted that the evidence that respondents participated in a conspiracy to distribute more than 50 grams of cocaine base was "overwhelming." App., *infra*, 23a, 24a. "[I]t would constitute a manifest injustice," he explained, "to reduce [respondents'] sentences when the evidence undeniably demonstrates that they committed the greater statutory offense." *Id.* at 23a. Although the superseding indictment did not specify drug quantity,

he found it "difficult to believe that [respondents] lacked notice that they faced 21 U.S.C. § 841(b)'s strictest penalties." *Id.* at 28a. He observed that the original indictment alleged the threshold drug quantity and that, in light of the evidence at trial, respondents' "counsel clearly were aware that the government could seek the elevated penalties available under 21 U.S.C. § 841(b)(1)(A)." *Id.* at 28a-29a.

Finally, Chief Judge Wilkinson criticized the majority for "inappropriately replac[ing] the discretionary, case-by-case assessment dictated by the fourth prong" of the plain-error test "with an essentially categorical approach when the error consists of an indictment defect." App., *infra*, 30a. Here, he emphasized, the majority's approach undermines Congress's policy to impose more stringent punishment for more serious violators, because it equates the punishment of "the conspiracy's kingpin and its underlings." *Id.* at 34a. In addition, he observed that the majority's approach unfairly disregards the fact that the superseding indictment was fully in accordance with then-prevailing law to support the enhanced sentences imposed and that, in light of the overwhelming proof, there is no doubt that the grand jury, if asked, would have included the necessary drug-quantity allegations in the indictment. *Id.* at 29a-30a. Overturning respondents' sentences in such circumstances, he concluded, cannot be justified on plain-error review. *Ibid.*

REASONS FOR GRANTING THE PETITION

The court of appeals held that, whenever a district court imposes a sentence that exceeds the otherwise applicable statutory maximum based on a fact that was not alleged in the indictment, the sentence must automatically be reversed on plain-error review—regard-

less of the existence of overwhelming evidence supporting that fact and the defendant's notice that the government could seek an enhanced sentence based on the fact. The court of appeals' decision is incorrect. Just as a failure to obtain a petit jury finding on an element does not require reversal on plain-error review, if the omitted fact was essentially uncontested and supported by overwhelming evidence, see *Johnson* v. *United States*, 520 U.S. 461, 469-470 (1997), a failure to obtain a grand jury finding on a fact that enhances the statutory maximum sentence does not require reversal, if the evidence was similarly overwhelming and the defendant did not contest the evidence while on notice of the need to do so.

The court of appeals' decision deepens a conflict in the circuits on whether an indictment's omission of a sentence-enhancing fact automatically warrants reversal where, as here, the defendant received a sentence greater than the maximum authorized by statute without reference to that fact. The question has arisen with particular frequency in federal drug prosecutions, such as this one, in which the indictment was returned, the case tried, and the sentence imposed before *Apprendi* v. *New Jersey*, 530 U.S. 466 (2000). But those are not the only cases implicating the question of whether, or how, this Court's decisions on plain-error and harmless-error review apply to indictment errors. Because the question is recurring and important, this Court's resolution of the conflict is warranted.

A. The Court Of Appeals' Rule Of Automatic Reversal Is Out Of Step With This Court's Plain-Error And Harmless-Error Precedents

The Fifth Amendment makes the grand jury the principal charging body in the federal system. Under

this Court's precedents, however, automatic reversal is unwarranted when an indictment omits to allege a fact necessary to support a criminal punishment above the otherwise-applicable statutory maximum. The omission of such an allegation, like most constitutional errors, is subject to plain-error and harmless-error review.

1. In *Apprendi*, this Court held, as a matter of constitutional law, that "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." 530 U.S. at 490. Although *Apprendi* did "not address the indictment question separately," *id.* at 477 n.3, its holding was based, in substantial part, on the conclusion that, under the common law and thereafter, facts that increased the punishment for a crime had to be charged in the indictment and found by the jury. See *id.* at 478-481; see also *id.* at 483 n.10 (historical evidence "point[s] to a single, consistent conclusion: The judge's role in sentencing is constrained at its outer limits by the facts alleged in the indictment and found by the jury"). *Apprendi* also noted that its holding was "foreshadowed" by the Court's statement in *Jones* v. *United States*, 526 U.S. 227 (1999), that "any fact (other than prior conviction) that increases the maximum penalty for a crime must be charged in an indictment, submitted to a jury, and proven beyond a reasonable doubt." 530 U.S. at 476 (quoting *Jones*, 526 U.S. at 243 n.6).

Before *Apprendi*, the courts of appeals uniformly concluded that threshold drug quantities that increased the statutory maximum sentence under 21 U.S.C. 841(b) were sentencing factors that did not have to be charged in a grand jury indictment or proved to a petit jury beyond a reasonable doubt. See *United States* v.

Sanchez, No. 00-13347, 2001 WL 1242087, at *11 (11th Cir. Oct. 17, 2001) (en banc) (discussing pre-*Apprendi* cases). After *Apprendi*, the courts of appeals have uniformly concluded that threshold drug quantities must be charged in a federal indictment and proved to a jury beyond a reasonable doubt to support an enhancement in the statutory maximum sentence. See *United States* v. *Promise*, 255 F.3d 150, 156-157 (4th Cir. 2001) (en banc) (citing cases from seven other circuits), petition for cert. pending, No. 01-6398 (Sept. 20, 2001). That conclusion follows from the logic of the Court's reasoning in *Apprendi* and the nature of the statutory scheme in Section 841(b).[2]

Under the graduated penalties set forth in 21 U.S.C. 841(b), when a defendant has been found guilty of a drug offense involving *any* detectable quantity of a Schedule II controlled substance (such as cocaine or cocaine base, see 21 U.S.C. 812), Section 841(b)(1)(C) authorizes "a term of imprisonment of not more than 20 years." If, however, a defendant's offense involves at least 500 grams of cocaine or at least 5 grams of cocaine base, he is subject to a term of imprisonment that "may be not less than 5 years and not more than 40 years." 21 U.S.C. 841(b)(1)(B)(ii) and (iii). And if his offense involves at least 5 kilograms of cocaine or at least 50 grams of cocaine base, he is subject to a term of

[2] The government previously argued in the lower courts that *Apprendi* should not be extended to the indictment stage of a federal criminal prosecution. In *Promise*, 255 F.3d at 156-157, and *Sanchez*, 2001 WL 1242087 at *18, *49 n.51, the en banc Fourth and Eleventh Circuits rejected that contention, and all of the other circuits that have addressed the question have held that *Apprendi* requires drug quantity to be charged in a federal indictment to support an increase in the statutory maximum sentence. The government does not contend otherwise here.

imprisonment that "may not be less than 10 years or more than life." 21 U.S.C. 841(b)(1)(A)(ii) and (iii).[3]

Under that scheme, sentences above the 20-year statutory maximum authorized by Section 841(b)(1)(C) depend on the presence of a penalty-enhancing fact, such as the fact here that respondents' offenses involved at least 50 grams of cocaine base. Under *Apprendi*'s reasoning, that fact must be alleged in the indictment to support a sentence above 20 years' imprisonment. As the court of appeals concluded, therefore, the imposition of sentences of more than 20 years' imprisonment in this case was error because of the omission of threshold drug quantity allegations from the superseding indictment.[4]

2. The court of appeals was incorrect, however, in holding that the *Apprendi* indictment error automatically requires reversal of respondents' sentences, despite the overwhelming evidence that respondents' offenses involved a sufficient quantity of drugs to trigger those sentences and respondents' notice that the government could seek enhanced sentences based on drug quantity. See App., *infra*, 15a (observing that, "[w]hile

[3] Similar quantity-based increases apply to other controlled substances, such as heroin, LSD, and methamphetamine. In addition, enhanced sentencing ranges apply to defendants with prior drug felony convictions. For example, a defendant with one prior drug felony conviction is exposed to a sentence of up to 30 years' imprisonment under 21 U.S.C. 841(b)(1)(C); of 10 years' to life imprisonment under 21 U.S.C. 841(b)(1)(B); and of 20 years' to life imprisonment under 21 U.S.C. 841(b)(1)(A). Offenses that result in bodily injury or death also receive enhanced punishment under the subparagraphs of Section 841(b).

[4] *Apprendi*, although decided after the return of the superseding indictment, applies here because the case is still pending on direct review. See *Griffith* v. *Kentucky*, 479 U.S. 314 (1987).

the government may well be correct as a factual matter" that the evidence "overwhelmingly establishes" drug quantities necessary to authorize respondents' sentences, "the quantum of evidence is not a relevant consideration when the error stems from a defect in the indictment"); *id.* at 14a-15a n.5 ("we do not consider post-indictment notice to be relevant").

This Court has recognized that "most constitutional errors can be harmless," and has "found an error to be 'structural,' and thus subject to automatic reversal, only in a 'very limited class of cases,'" such as those involving a denial of counsel, a biased trial judge, or racial discrimination in jury selection. *Neder* v. *United States*, 527 U.S. 1, 5, 8 (1999) (quoting *Johnson* v. *United States*, 520 U.S. 461, 468 (1997)). In contrast to those errors that have been held to be "structural," the Court explained in *Neder*, a jury "instruction that omits an element of the offense does not *necessarily* render a criminal trial fundamentally unfair or an unreliable vehicle for determining guilt or innocence." *Id.* at 9. The omission of an element from an indictment, like the omission of an element from a jury instruction in *Neder*, does not necessarily render a criminal proceeding "fundamentally unfair" or "unreliable." It is thus not a circumstance in which automatic reversal is required.

Moreover, the claim of error in this case, as in many cases that involve sentences imposed before *Apprendi*, was not raised in the district court. As this Court has made clear, all claimed errors in federal criminal trials, regardless of their nature or seriousness, are subject to the plain-error rules set out in Rule 52(b) of the Federal Rules of Criminal Procedure when the defendant does not make a timely objection in the district court. See *Johnson*, 520 U.S. at 466-467 (in order for an appellate court to correct an error that was not raised in the trial

court, there must be (1) an error, (2) that is "plain," (3) that "affect[s] substantial rights," and (4) that "seriously affect[s] the fairness, integrity, or public reputation of judicial proceedings"). "'No procedural principle is more familiar to this Court than that a constitutional right,' or a right of any other sort, 'may be forfeited in criminal as well as civil cases by the failure to make timely assertion of the right before a tribunal having jurisdiction to determine it.'" *United States* v. *Olano*, 507 U.S. 725, 731 (1993) (quoting *Yakus* v. *United States*, 321 U.S. 414, 444 (1944)). Even a conclusion that a particular type of error is "structural," or "so serious as to defy harmless-error analysis," suggests only that such an error may always "affec[t] substantial rights," thus satisfying the third of the four requirements for plain-error relief. See *Johnson*, 520 U.S. at 468-469. Under the fourth requirement, a prejudicial error (including a "structural" one) that would clearly be grounds for relief if it was properly preserved is not a proper ground for relief if it was not preserved, unless it also "seriously affect[s] the fairness, integrity or public reputation of judicial proceedings." *Id.* at 469-470 (quoting *Olano*, 507 U.S. at 736).

Here, as in *Johnson*, relief on plain-error review is not warranted, because the indictment error does not call into question the fairness, integrity, or public reputation of the judicial proceedings resulting in respondents' sentences. As Chief Judge Wilkinson noted in dissent, "there is no question that [respondents] participated in a conspiracy to distribute more than 50 grams of cocaine base," the quantity necessary to trigger a sentence of life imprisonment under Section 841(b)(1)(A)(iii). App., *infra*, 24a; see also *id.* at 26a-28a (describing some of "the most incriminating evidence regarding the quantity of cocaine base" involved in

respondents' offenses). It is also "difficult to believe that [respondents] lacked notice that they faced [Section 841(b)'s] strictest penalties," especially since the original indictment expressly charged them with participation in a conspiracy involving, *inter alia*, at least 50 grams of cocaine base and the factual presentation involved quantities that supported "the elevated penalties available under" Section 841(b)(1)(A). *Id.* at 28a-29a. Under these circumstances, overturning respondents' sentences is an unjustified response to the omission of a drug quantity allegation from the indictment. Cf. *Johnson*, 520 U.S. at 469-470 (declining to reverse a conviction on plain-error review when a petit jury instruction omitted an element on which the evidence was "overwhelming" and "essentially uncontroverted").

3. In concluding that a sentence that exceeds the otherwise applicable statutory maximum based on a fact not alleged in the indictment must automatically be reversed under the plain-error standard, the court of appeals reasoned, in reliance on *Ex parte Bain*, 121 U.S. 1 (1887), that a district court "exceed[s] its jurisdiction" to impose such a sentence. App., *infra*, 9a. *Bain* does not justify that conclusion.

In *Bain*, this Court granted collateral relief after the trial court permitted the government to strike a portion of the indictment and try the defendant on a narrower theory than the one set forth in the indictment. Although the Court characterized the error as one that deprived the trial court of "jurisdiction," 121 U.S. at 13, that characterization is contrary to the Court's precedents. See, *e.g.*, *Ex parte Watkins*, 28 U.S. (3 Pet.) 193, 201 (1830) (Marshall, C.J.) (explaining that, even if the habeas petitioner were correct in claiming that "the indictment charges no offence for which [he] was punishable in that court," such an error would not mean that the trial court lacked jurisdiction); *Lamar* v. *United States*, 240 U.S. 60, 65 (1916) (Holmes, J.) (explaining that an "objection that the indictment does not charge a crime against the United States goes only to the merits of the case," not to the district court's jurisdiction).

The characterization in *Bain* appears to have resulted from the fact that, at that time, habeas relief could be granted only when the court that rendered judgment lacked jurisdiction. See *Schlup* v. *Delo*, 513 U.S. 298, 317 (1995) ("[T]he writ originally performed only the narrow function of testing either the jurisdiction of the sentencing court or the legality of Executive detention."); *Preiser* v. *Rodriguez*, 411 U.S. 475, 485 (1973) (under "[t]he original view," the "relevant inquiry was confined to determining simply whether or not the committing court had been possessed of jurisdiction"). Subsequently, however, the Court recognized that its authority to award habeas relief exists whenever the judgment under review involves constitutional error, regardless of whether the error could be described as "jurisdictional." See *Custis* v. *United States*, 511 U.S. 485, 494 (1994); *Waley* v. *Johnston*, 316 U.S. 101, 104-105 (1942) (per curiam); see also *Wainwright* v. *Sykes*, 433 U.S. 72, 79 (1977) (by the time of *Waley*, the Court "openly discarded the concept of jurisdiction—by then more a fiction than anything else—as a touchstone of the availability of federal habeas review"). The use of the term "jurisdictional error" to describe an error other than an utter lack of power even to adjudicate the merits of a motion is thus generally obsolete.

Today, the omission from the indictment of an essential element (or sentence-enhancing fact) is appropriately understood as a constitutional error, not a jurisdictional error. It involves a violation of the Fifth

Amendment right to be tried for a federal felony offense only after an indictment has been returned. That error should be evaluated under the same harmless-error and plain-error standards that are applicable to other deprivations of a defendant's constitutional rights.[5]

The court of appeals also cited *Stirone* v. *United States*, 361 U.S. 212 (1960). App., *infra*, 9a-10a, 11a. In *Stirone*, the Court held that a defendant was deprived of his Fifth Amendment right to a grand jury indictment when the government proved an element at trial in a manner that departed from the way in which that element was alleged in the indictment. The Court went on to observe that such a deprivation "is far too serious to be treated as nothing more than a variance and then dismissed as harmless error." 361 U.S. at 217. *Stirone* was decided before the Court's comprehensive adoption of harmless-error analysis in *Chapman* v. *California*, 386 U.S. 18 (1967). As Justice Stewart noted in his concurrence in that case, before *Chapman*, the Court had "steadfastly rejected any notion that constitutional

[5] The conclusion that an indictment's failure to allege an essential element of an offense is not a fatal defect that deprives the district court of jurisdiction is confirmed by the fact that the right to a grand jury indictment may be waived. See Fed. R. Crim. P. 7(b) (defendant in a non-capital case may waive right to indictment and allow the government to proceed by information). But a true absence of subject-matter jurisdiction cannot be waived. See *United States* v. *Griffin*, 303 U.S. 226, 229 (1938) ("lack of jurisdiction of a federal court touching the subject matter of the litigation cannot be waived by the parties"). As the Eleventh Circuit has explained, "[t]he constitutional right to be charged by a grand jury is a personal right of the defendant and does not go to the district court's subject matter jurisdiction because it may be waived." *McCoy* v. *United States*, No. 00-16434, 2001 WL 1131653, at *2 (11th Cir. Sept. 25, 2001).

violations might be disregarded on the ground that they were 'harmless.'" *Id.* at 42-43 (Stewart, J., concurring) (collecting cases). *Stirone*, which was decided in an era in which constitutional errors generally required per se reversal, therefore does not control the analysis in this case. As noted above, the Court recognized in *Neder* that most constitutional errors can be harmless, and did not identify *Stirone* as one of the "very limited class of cases" that involve an exception to that rule. See 527 U.S. at 8; see also App., *infra*, 31a (Wilkinson, C.J., concurring in part and dissenting in part) (noting that this Court has "not include[d] indictment defects in its list of structural errors").[6]

Nor does *Silber* v. *United States*, 370 U.S. 717 (1962) (per curiam), on which the court of appeals also relied (see App., *infra*, 12a-13a), establish that an indictment error requires reversal in all circumstances. *Silber*

[6] Moreover, *Stirone* involved a claim of error that was properly preserved at trial. See 361 U.S. at 214. The Court thus had no occasion to address the analysis that would have applied if the claim had been raised for the first time on appeal. This case, like many similar cases decided by the courts of appeals in the wake of *Apprendi*, involves a claim of indictment error that was not raised in the district court and thus is reviewed under the plain-error standard. *Stirone* is also inapplicable here because, in contrast to a case like *Stirone*, in which "the charging terms (or allegations in the indictment) are materially broadened and altered to such a significant extent as to constitute an entirely new or different theory of the case, * * * allegations in § 846 or § 841 indictments that charge generally that a defendant conspired or possessed with intent to distribute cocaine base are not even broadened when a precise amount of that alleged cocaine base is proven at trial or at sentencing. Proof that supports only a precise drug quantity falls within [the defendant's] broader drug conspiracy and, if anything narrows the allegations in the indictment to that amount." *McCoy*, 2001 WL 1131653, at **4-5.

recognized that this Court may, "[i]n exceptional circumstances," notice errors that were not raised on appeal, "if the errors are obvious, or if they otherwise seriously affect the fairness, integrity or public reputation of judicial proceedings." 370 U.S. at 718. The Court, applying that standard, held that the indictment error in *Silber*, which was raised and decided in the district court, warranted reversal of a conviction under a supervening decision of the Court, even though the defendant had not asserted the indictment error on appeal. But the Court did not hold that all indictment errors in violation of the Fifth Amendment necessarily require reversal under that standard. See App., *infra*, 32a-33a (Wilkinson, C.J., concurring in part and dissenting in part) (discussing *Silber*). In any event, *Silber*, like *Stirone*, predates this Court's articulation of harmless-error analysis in *Chapman*, and this Court has not had an opportunity to address the effect of *Chapman* on those earlier holdings.

B. The Courts Of Appeals Are In Conflict On The Proper Disposition Of Claims Of Erroneous Omissions From Federal Indictments, And This Court's Resolution Of That Conflict Is Warranted

1. The courts of appeals have fallen into an irreconcilable conflict over whether the omission of an allegation of threshold drug quantity always warrants reversal of a sentence that exceeds the statutory maximum authorized by Section 841(b) without regard to drug quantity.

The Eleventh Circuit has "consistently applied plain error and harmless error review to *Apprendi* claims that an indictment failed to include a specific drug quantity," and has affirmed enhanced sentences, despite the omission of a drug quantity allegation from

the indictment, if no rational jury would have convicted the defendant "without concluding that [he] was responsible for a drug amount sufficient to justify the enhanced sentence." *United States* v. *Cromartie*, No. 00-13957, 2001 WL 1167785, at ** 2-4 (Oct. 3, 2001) (per curiam). The en banc court reaffirmed that point in *Sanchez*, 2001 WL 1242087, at **15-16 (rejecting the argument that *Apprendi* indictment error is "structural" or "jurisdictional"). See also *United States* v. *Swatzie*, 228 F.3d 1278, 1281-1284 (11th Cir. 2000), cert. denied, 121 S. Ct. 2600 (2001). Similarly, the First and Seventh Circuits have applied the plain-error standard to *Apprendi* indictment errors and have upheld enhanced sentences where it is clear that any rational jury that convicted the defendant would have found, if asked, that the offense involved the enhancing quantity of drugs. See, *e.g.*, *United States* v. *Terry*, 240 F.3d 65, 74-75 (1st Cir.), cert. denied, 121 S. Ct. 1965 (2001); *United States* v. *Patterson*, 241 F.3d 912, 914 (7th Cir.) (per curiam), cert. denied, No. 00-10365 (Oct. 1, 2001); *United States* v. *Nance*, 236 F.3d 820, 825-826 (7th Cir. 2000), cert. denied, No. 00-9633 (Oct. 1, 2001); see also App., *infra*, 33a (Wilkinson, C.J., concurring in part and dissenting in part) (noting circuit conflict).

In contrast, the Fifth Circuit has concluded that automatic reversal of enhanced sentences is required when drug quantity is not alleged in the indictment, see *United States* v. *Longoria*, 259 F.3d 363, and *United States* v. *Gonzalez*, 259 F.3d 355, although the court has granted rehearing en banc to reconsider that position, see 262 F.3d 455 (2001). The Eighth Circuit has taken the same position, at least when the defendant is convicted after a trial and has not stipulated to drug quantity, *United States* v. *Maynie*, 257 F.3d 908 (2001), and on October 18, 2001, it denied the government's

petition for rehearing and rehearing en banc. And the Fourth Circuit's holding in this case accords with the position articulated by a majority of the en banc court's members in *Promise*, *supra*. See App., *infra*, 14a.

2. The circuit conflict about the application of plain-error or harmless-error review to the omission of drug quantity from indictments charging drug-trafficking offenses is indicative of a broader conflict about whether the omission of an offense element from an indictment invariably requires reversal.

The Tenth Circuit, sitting en banc, recently overruled prior precedents and held, under *Neder*, that omission of an offense element from an indictment is subject to harmless-error analysis. *United States* v. *Prentiss*, 256 F.3d 971, 981-985 (2001) (per curiam) (affirming conviction under harmless-error standard where indictment charging arson committed in Indian country under 18 U.S.C. 81 and 1152 failed to allege Indian and non-Indian status of victim and defendant).[7] The Tenth Circuit expressly disagreed with recent decisions of two other circuits—*United States* v. *Tran*, 234 F.3d 798 (2d Cir. 2000), and *United States* v. *Spinner*, 180 F.3d 514 (3d Cir. 1999)—that hold that the omission of an element from the indictment is a "jurisdictional" error that requires automatic reversal. *Prentiss*, 256 F.3d at 982. Similarly, the First Circuit has held that the failure to allege the type of firearm in an indictment under 18 U.S.C. 924(c) does not require automatic reversal of a conviction for an aggravated offense, when the evidence of firearm type was overwhelming and the defendants had adequate notice that firearm type was at issue. *United States* v. *Mojica-Baez*, 229 F.3d 292, 308-311 (2000), cert. denied, 121 S. Ct. 2215 (2001).

[7] In *United States* v. *Jackson*, 240 F.3d 1245, 1247-1249, cert. denied, No. 00-10251 (Oct. 1, 2001), a case decided before *Prentiss*, the Tenth Circuit held that the failure to charge drug quantity in an indictment under 21 U.S.C. 841 is not susceptible to plain-error or harmless-error review when the sentence exceeds the otherwise applicable statutory maximum. The Tenth Circuit has not addressed the relationship between *Jackson* and *Prentiss*.

In contrast, the Second Circuit held in *Tran* that the omission of the type of firearm from an indictment charging a violation of 18 U.S.C. 924(c) deprived the district court of jurisdiction to sentence the defendants for an aggravated offense based on the type of firearm. See 234 F.3d at 808-810; see also *id.* at 809 & n.2 (expressly disagreeing with *Mojica-Baez*). The en banc Second Circuit is reconsidering the reasoning of the *Tran* panel in *United States* v. *Thomas*, Nos. 98-1051 et al., a case involving a claim of indictment error under *Apprendi* in a drug prosecution under 21 U.S.C. 841. See 248 F.3d 76, 78 (2d Cir. 2001) (ordering rehearing en banc and requesting briefing on the soundness of *Tran*'s reasoning). Other courts have also ruled that indictment errors are necessarily fatal. See, *e.g.*, *United States* v. *Cabrera-Teran*, 168 F.3d 141, 144-147 (5th Cir. 1999) (district court was without jurisdiction to accept guilty plea where indictment charging illegal reentry under 8 U.S.C. 1326 failed to allege that defendant had been arrested); *Spinner*, 180 F.3d at 515-516 (omission of interstate commerce element from indictment charging access fraud under 18 U.S.C. 1029(a)(5) was "jurisdictional defect" that required automatic reversal of conviction).

As those decisions illustrate, omissions of an essential allegation from an indictment can result from intervening clarifications of the law by appellate courts as well as from oversights by prosecutors in drafting indictments. Although federal prosecutors have, since the Court's decision in *Apprendi*, routinely charged thresh-

old drug quantities in indictments when sentencing will be governed by 21 U.S.C. 841, the question whether indictment errors automatically require reversal will continue to arise outside the context of *Apprendi* and Section 841. The recurring question of how to treat indictment errors, which has recently been addressed by three en banc courts and is pending before two others, requires the reconciliation of this Court's precedents and can be finally and uniformly resolved only by this Court.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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OCTOBER 2001

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

Nos. 99-4162 to 99-4164, 99-4175, 99-4189 to 99-4191 and 99-4197

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

v.

LEONARD COTTON, A/K/A COOCH,
DEFENDANT-APPELLANT

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

v.

DARLENE GREEN, A/K/A SPRINKLES,
DEFENDANT-APPELLANT

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

v.

MARQUETTE HALL, A/K/A BUTT NAKED,
DEFENDANT-APPELLANT

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

v.

LAMONT THOMAS, A/K/A TREE,
DEFENDANT-APPELLANT

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

v.

MATILDA HALL, DEFENDANT-APPELLANT

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

v.

JOVAN POWELL, DEFENDANT-APPELLANT

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

v.

JESUS HALL, A/K/A WEEDY, A/K/A JESSE HALL, DEFENDANT-APPELLANT

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

v.

STANLEY HALL, JR., A/K/A BOONIE, DEFENDANT-APPELLANT

[Argued: Apr. 4, 2001]
[Decided: Aug. 10, 2001]

Before: WILKINSON, Chief Judge, and LUTTIG and GREGORY, Circuit Judges.

LUTTIG, Circuit Judge:

Stanley Hall, Jr. and seven other members of a drug organization (collectively "appellants") were convicted of one count of conspiracy to distribute and possession with intent to distribute cocaine hydrochloride and cocaine base, in violation of 21 U.S.C. §§ 841(a)(1) and 846. Appellants raise a number of challenges to their convictions and sentences. For the reasons that follow, we affirm the convictions, and vacate and remand for resentencing.

I.

Stanley Hall, Jr. ("Hall, Jr."), the leader of a vast drug organization, was the principal supplier of drugs in the 200 block of North Duncan Street in Baltimore, Maryland. According to testimony adduced at trial, Hall, Jr., with the assistance of a number of the other appellants, obtained a supply of cocaine in kilogram quantities from a dealer in New York City, and then "cooked" the cocaine into crack and "bagged" it for distribution. Hall, Jr. would then distribute the drugs to his dealers, including the other appellants, who would, in turn, sell cocaine and crack to their customers.

In October 1997, federal authorities obtained search warrants for the residences utilized by the appellants for their drug trade. Following the seizure of drugs, drug paraphernalia, currency, and weapons, appellants were arrested and charged with a single count of conspiracy to distribute and possession with intent to distribute cocaine hydrochloride *and* cocaine base. J.A. 86.

Appellants were convicted by a jury of the sole count of the indictment.[1] The district court sentenced Hall, Jr., Leonard Cotton, Lamont Thomas, and Marquette and Jesus Hall to life imprisonment upon finding, by a preponderance of the evidence, that over 1.5 kilograms of cocaine base was attributable to each from their participation in the conspiracy. J.A. 822-23 (Hall, Jr.); J.A. 573-74 (Thomas); J.A. 507 (Cotton); J.A. 723 (Jesus Hall); J.A. 505 (Marquette Hall). Based on the same finding regarding drug quantity, the district court sentenced Jovan Powell to 30 years imprisonment. J.A.

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[1] The jury acquitted one defendant, Roger Evans.

769-70. Matilda Hall also received 30 years imprisonment based on the district court's finding, by a preponderance of the evidence, that she was responsible for more than 500 grams, but less than 1.5 kilograms, of cocaine base from her participation in the conspiracy. J.A. 667-68. Finally, Darlene Green was sentenced to 15 years imprisonment based upon the district court's attribution of more limited quantities of cocaine base to her. J.A. 541.

Following sentencing, appellants filed a motion for a new trial on the basis of newly discovered evidence, and this appeal was stayed pending the district court's resolution of that motion. The district court subsequently denied the motion.

II.

Appellants argue that the district court erred when it sentenced them based upon its findings regarding the quantity of a drug—cocaine base—carrying a potentially higher statutory penalty, because the jury's verdict was ambiguous with regard to which drug was the object of the conspiracy. Thus, they contend that pursuant to our decision in *United States v. Rhynes*, 196 F.3d 207 (4th Cir. 1999), *vacated in part on other grounds*, 218 F.3d 310 (4th Cir. 2000) (en banc), the lack of a special jury verdict form requiring the jury to determine specifically whether the conspiracy involved cocaine hydrochloride, cocaine base, or both, constrained the district court to sentence appellants based on the drug carrying the lower statutory penalty.

In *Rhynes*, the jury was instructed that it could find defendants guilty if they distributed or possessed with intent to distribute *any* of the drugs charged as part of the conspiracy, which included marijuana, cocaine,

heroin, or cocaine base. 196 F.3d at 237. Because the jury returned a general verdict of guilty, we held that the district court's instruction created ambiguity as to whether the jury found a conspiracy to distribute all the drugs, a single drug, or some combination thereof. *See id.* at 238. As a result of such ambiguity, we held that the district court could not impose a "sentence in excess of the statutory maximum for the least-punished object on which the conspiracy conviction could have been based." *Id.*

In the present case, there is no *Rhynes* error because the jury was unambiguously instructed that a conspiracy conviction could be based only upon a finding —as charged by the government in the indictment —that appellants conspired to distribute or possessed with intent to distribute cocaine hydrochloride *and* cocaine base.[2] S.A. ("In order to establish the offense of conspiracy to distribute and possess with intent to distribute cocaine hydrochloride *and* cocaine base *as charged in the indictment*, the government must prove two elements, beyond a reasonable doubt.") (emphasis added); S.A. 13 [8] ("If you find that the materials

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[2] Nor does the jury instruction cited by appellants compel a contrary conclusion. S.A. 6 ("You are instructed that, as a matter of law, cocaine hydrochloride and cocaine base are both controlled substances as those terms are used in these instructions and in the indictment and the statutes I just read to you. You must, of course, determine whether or not the materials in question were, in fact, either cocaine hydrochloride, or cocaine base."). For, in instructing the jury on the definition of "controlled substance," the district court was not charging the jury on what it must find to convict appellants of conspiracy, but, rather, was instructing the jury that either cocaine hydrochloride or cocaine base qualify as "controlled substance[s]," as that term is defined in 21 U.S.C. § 802(6).

involved in the charged conspiracy were cocaine hydrochloride *and* cocaine base, you need not be concerned with the quantities, so as [sic] long as you find that a defendant conspired to distribute or possessed with intent to distribute *these controlled substances*, the amounts involved are not important.") (emphasis added). Furthermore, the evidence was sufficient in this case if not overwhelming to support a "construction" of the verdict that the jury found a conspiracy with regard to cocaine base *and* cocaine hydrocholoride where, *inter alia*, approximately 380 grams of cocaine base and 85 grams of cocaine hydrochloride *were actually seized* from the various conspirators and "stash houses." *See United States v. Green*, 180 F.3d 216, 226 (5th Cir. 1999) (stating that "even where there is a conspiracy general verdict, the sentencing court can still conclude that the jury found, beyond a reasonable doubt, guilt for more than just one object-offense" when the jury has *not* been instructed in the alternative and the evidence "would support such construction of the verdict actually obtained"); *United States v. Watts*, 950 F.2d 508, 515 (8th Cir. 1991) (stating that where an indictment was phrased in the conjunctive and "evidence of all three drugs was introduced," the court "did not elicit an ambiguous or unclear verdict from the jury").

Accordingly, we are "more than confident, that the jury was convinced beyond a reasonable doubt that both cocaine [hydrochloride] and [cocaine base] were involved" and that appellants were convicted of *a single multi-drug* conspiracy. *Green*, 180 F.3d at 226. Because we can discern no ambiguity in this jury verdict, we conclude that the district court did not err in sentencing

appellants based upon the relevant penalty provisions for cocaine base.

III.

Appellants (except Darlene Green, who was sentenced to a term of less than 20 years imprisonment)[3] also contend that their sentences are invalid under *Apprendi v. New Jersey*, 530 U.S. 466, 120 S. Ct. 2348, 147 L.Ed.2d 435 (2000), because a specific threshold drug quantity was neither alleged in the indictment nor proven to the jury beyond a reasonable doubt. Because appellants failed to raise this argument before the district court, we review for plain error. *See* Fed. R.

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[3] Darlene Green raises two challenges to her sentence, neither of which has merit. First, Green argues that the district court erred in failing to grant a two-level downward adjustment on the ground that she was a "minor participant" in the conspiracy. *See* U.S.S.G. § 3B1.2(b). Green admitted at trial, however, that she was a drug dealer, and, of course, in convicting her, the jury found that she was a member of the drug conspiracy. Thus, as we have previously held, a district court does not clearly err in declining to grant a dealer a downward adjustment for "minor participation" because a "seller" possesses "a central position in a drug distribution conspiracy." *United States v. Brooks*, 957 F.2d 1138, 1149 (4th Cir.1992).

Second, Green contends that the district court erred in granting her a two-level upward adjustment for obstruction of justice. We reject Green's argument because there was ample evidence from which the district court concluded that Green provided "materially false information" to the jury that went far beyond a mere denial of guilt. *United States v. Romulus*, 949 F.2d 713, 717 (4th Cir. 1991); *see also United States v. Gormley*, 201 F.3d 290, 294 (4th Cir. 2000) (holding that the district court did not err in imposing an obstruction of justice enhancement where defendant's false statements went beyond "merely denying his guilt").

Crim. P. 52(b); *United States v. Olano*, 507 U.S. 725, 731-32, 113 S. Ct. 1770, 123 L.Ed.2d 508 (1993).

In *United States v. Promise*, 255 F.3d 150 (4th Cir. 2001), this court, sitting *en banc*, held that because drug quantity "must be treated as an element of an aggravated drug trafficking offense" under 21 U.S.C. § 841, *Promise*, 255 F.3d at 156, the failure to charge a specific threshold drug quantity in the indictment and to submit the quantity issue to the jury constitutes plain error, *see id.* at 159-60. We further concluded that such error affects defendants' substantial rights where, as here, the defendants are sentenced to a term of imprisonment greater than that set forth in section 841(b)(1)(C) for a conviction based on an undetermined quantity of drugs, *see id.* at 160-62, and the defendants can demonstrate that their sentence is "longer than that to which [they] would otherwise be subject," *United States v. Angle*, 254 F.3d 514, 518 (4th Cir. 2001) (en banc).

However, the question left open by *Promise* is whether the failure to charge drug quantity in the indictment and to submit it to the jury "'seriously affect[s] the fairness, integrity or public reputation of judicial proceedings,'" *Olano*, 507 U.S. at 736, 113 S. Ct. 1770 (quoting *United States v. Atkinson*, 297 U.S. 157, 160, 56 S. Ct. 391, 80 L.Ed. 555 (1936)), so that we should exercise our discretion to recognize the error. We now answer that question in the affirmative.

A.

Our initial task is to define the nature of the error in this case. The appellants argue that the district court erred not only by failing to instruct the jury on an essential element—drug quantity—of an aggravated drug offense, but that the district court exceeded its

jurisdiction by sentencing them for a crime with which they were never charged.[4] We agree.

In this case, the government indicted the appellants for a violation of section 841 based upon "a mixture or substance containing a detectable amount of cocaine base, commonly known as 'crack.'" J.A. 86. Yet the district court, in turn, sentenced seven of the appellants to a term of imprisonment greater than twenty years, the maximum penalty provided for a violation of section 841(b)(1)(C) based upon "an identifiable but unspecified quantity" of cocaine base, *Promise*, 255 F.3d at 156. Consequently, by sentencing the appellants to a term of imprisonment greater than that provided for in section 841(b)(1)(C), the appellants received a sentence for a crime—an aggravated drug trafficking offense under section 841(b)(1)(A)—with which they were *neither* charged *nor* convicted.

The Fifth Amendment to the United States Constitution requires that "[n]o person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury." The Supreme Court has explained that "an indictment found by a grand jury [is] indispensable to the power of the court to try the petitioner for the crime with which he was charged," *Ex Parte Bain*, 121 U.S. 1, 12-13, 7 S. Ct. 781, 30 L.Ed. 849 (1887), and "that a court *cannot* permit a defendant to be tried on charges that are not made in the indictment against him," *Stirone v. United States*, 361 U.S. 212, 217, 80 S. Ct. 270, 4 L.Ed.2d 252

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[4] In contrast, the government argues, as it did in *Promise*, that the error is merely instructional because drug quantity need not be charged in the indictment, an argument that a majority of this court rejected in *Promise*. *See Promise*, 255 F.3d at 156-57.

(1960) (emphasis added). Thus, when an indictment fails to set forth an "essential element of a crime," "[t]he court . . . ha[s] no jurisdiction to try [a defendant] under that count of the indictment." *United States v. Hooker*, 841 F.2d 1225, 1232-33 (4th Cir. 1988).

And, of course, a district court cannot impose a sentence for a crime over which it does not even have jurisdiction to try a defendant. Indeed, the Supreme Court explained just last year in *Apprendi v. New Jersey*, 530 U.S. 466, 120 S. Ct. 2348, 147 L.Ed.2d 435 (2000), that the "'indictment must contain an allegation of every fact which is *legally essential* to the punishment to be inflicted,'" 530 U.S. at 490 n.15, 120 S. Ct. 2348 (emphasis added) (quoting *United States v. Reese*, 92 U.S. 214, 232-33, 23 L.Ed. 563 (1875)), because "[t]he judge's role in sentencing is constrained at its outer limits by the facts alleged in the indictment and found by the jury," *id.* at 483 n.10, 120 S. Ct. 2348. Thus, because an indictment setting forth all the essential elements of an offense is both mandatory and jurisdictional, and a "defendant cannot be 'held to answer' for any offense not charged in an indictment returned by a grand jury," *United States v. Tran*, 234 F.3d 798, 808 (2d Cir. 2000), a court is without "jurisdiction to . . . *impose a sentence* for an offense not charged in the indictment," *id.* (emphasis added); *id.* ("[A] prosecutor cannot make [a] jurisdictional end run, and then urge the court to sentence the defendant for an offense for which the defendant was neither charged nor convicted.").

To hold otherwise would be to allow the court to impermissibly broaden the indictment on its own accord during the sentencing phase. To be sure, the district court's actions in this case did not technically result in a

constructive amendment of the indictment as the court did not broaden "the possible bases for *conviction* beyond those presented by the grand jury." *United States v. Floresca*, 38 F.3d 706, 710 (1994) (en banc) (emphasis added). But there is no question that "the effect of what it did was the same," *Stirone*, 361 U.S. at 217, 80 S. Ct. 270, because the district court sentenced the appellants for a crime with which they were never charged. *See Promise*, 255 F.3d at 188-89 (Motz, J., joined by Widener, Michael, King, JJ., concurring in part and dissenting in part, and dissenting in the judgment) ("[A]lthough the government presented the grand jury with an indictment containing only the elements necessary to charge [the defendant] with a violation of § 841(b)(1)(C), the district court sentenced him to the more serious crime defined in § 841(b)(1)(A); the court did not formally amend the indictment, but its sentence had the same effect."). In doing so, the district court encroached upon the prerogative of the grand jury, because only the grand jury has the power to broaden the charges "after an indictment has been returned." *Stirone*, 361 U.S. at 215-16, 80 S. Ct. 270.

Accordingly, the district court exceeded its jurisdiction in sentencing the appellants for a crime with which they were never charged, thus depriving them of the constitutional right to "answer" only for those crimes presented to the grand jury.

B.

Having identified the nature of the error committed by the district court, we must resolve the question that plagued an evenly divided court in *Promise*—that is, whether we should exercise our discretion to correct the error where an indictment fails to charge drug

quantity and the district court sentences a defendant to a term of imprisonment that exceeds the statutory maximum set forth in section 841(b)(1)(C). *Compare Promise*, 255 F.3d at 164 (Wilkins, J., joined by Wilkinson, C.J., and Williams and Traxler, JJ.) (holding that "[i]t would be a miscarriage of justice to allow [the defendant] to avoid a sentence for the aggravated drug trafficking crime that evidence overwhelmingly demonstrates he committed"), *with id.* at 190 (Motz, J., joined by Widener, Michael, and King, JJ.) ("Certainly, sentencing a man for a crime for which he has been neither charged nor convicted seriously affects the fairness, integrity, and public reputation of judicial proceedings."). Because we believe that the "nature of the error" is "fundamental," *United States v. David*, 83 F.3d 638, 648 (4th Cir. 1996), that the "plain error was committed in a matter so absolutely vital to defendants," *Wiborg v. United States*, 163 U.S. 632, 658, 16 S. Ct. 1127, 41 L.Ed. 289 (1896), and, most importantly, that the error "seriously affect[s] the fairness, integrity or public reputation of judicial proceedings," *Olano*, 507 U.S. at 736, 113 S. Ct. 1770 (quoting *Atkinson*, 297 U.S. at 160, 56 S. Ct. 391), we "feel ourselves at liberty to correct it," *Wiborg*, 163 U.S. at 658, 16 S. Ct. 1127.

The Supreme Court has recognized that there are cases in which an error may seriously affect the fairness, integrity or public reputation of judicial proceedings even "independent of the defendant's innocence." *Olano*, 507 U.S. at 736-37, 113 S. Ct. 1770. One such case is *Silber v. United States*, 370 U.S. 717, 82 S. Ct. 1287, 8 L.Ed.2d 798 (1962) (per curiam), in which the Court considered whether to notice a defect in an indictment. In its short per curiam opinion, the Supreme Court concluded that the defect in the indictment

constituted *reversible* plain error even though the error was not raised in *either* the Court of Appeals or the Supreme Court. *Silber*, 370 U.S. at 717, 82 S. Ct. 1287; *see also United States v. Brown*, 995 F.2d 1493, 1504 (10th Cir. 1993) (holding that the failure to charge an "essential element" of a crime in the indictment is an error "which should be noted by an appellate court *sua sponte* as plain error"); *United States v. Clark*, 412 F.2d 885, 887-88 (5th Cir. 1969) (concluding that the failure of the indictment to state a criminal offense "constitutes plain error within the meaning of [Fed. R. Crim. P.] 52(b) and warrants reversal by a reviewing court"); *Chappell v. United States*, 270 F.2d 274, 276 (9th Cir. 1959) (deciding that where the indictment did not state a criminal offense, it "constitute[d] plain error within the meaning of Rule 52(b)"); *cf.* Fed. R. Crim. P. 12(b)(2) (stating that the failure of the indictment to "charge an offense . . . shall be noticed by the court at any time during the pendency of the proceedings").

To be sure, the error in *Silber* was that the defendant was *convicted* based upon an indictment that did not charge a crime, whereas here the error is that the defendant was *sentenced* more harshly based upon an element that was not charged in the indictment. We do not believe, however, that this is a substantive distinction. We cannot imagine that the Supreme Court would believe itself bound to notice the error when a conviction is based upon a crime with which a defendant was not charged on the one hand, but, on the other hand, decline to recognize the error under the equally (or possibly more) egregious circumstance where a defendant is sentenced based upon a crime that was not charged in the indictment *nor even presented to the petit jury*. *See Tran*, 234 F.3d at 809 ("If the district

court acts beyond its jurisdiction by trying, accepting a guilty plea from, *convicting, or sentencing a defendant* for an offense not charged in the indictment, *this Court must notice such error and act accordingly to correct it*, regardless of whether the defendant has raised the issue." (emphases added)). Indeed, in both cases, the district court acts without jurisdiction. *See supra* at 404.

Our conclusion that the error should be noticed is further reinforced by *United States v. Floresca*, 38 F.3d 706 (4th Cir. 1994) (en banc), in which we corrected plain error when the district court constructively amended the indictment by instructing the jury on a different subsection of a criminal statute, *even though the indictment charged a federal crime.* 38 F.3d at 709, 714. There, we recognized the fundamental nature of the error—namely, that "[the defendant] was held accountable in a federal court for an 'infamous crime' for which he was never indicted by a grand jury." *Id.* at 713-14. We did not hesitate to say "that convicting a defendant of an unindicted crime affects the fairness, integrity, and public reputation of federal judicial proceedings in a manner most serious." *Id.* at 714.

Likewise here, we have no trouble concluding that *sentencing* a defendant for an unindicted crime also seriously affects the fairness, integrity or public reputation of judicial proceedings. Indeed, it appears from the separate opinions in *Promise* that at least six members of this court would also so hold.[5] *See Promise*, 255 F.3d

[5] While we do not consider post-indictment notice to be relevant, it appears that even the four members of the court who declined to recognize the error in *Promise* would recognize the error here. For, post-indictment notice, which they found there to be "critical[ ]," is absent in this case. 255 F.3d at 163-65 (Wilkins, J., joined by Wilkinson, C.J., and Williams and Traxler, JJ.); *id.* at 192 n.3 (Motz, J., joined by Widener, Michael, and King, JJ.) ("Presumably, even overwhelming and uncontroverted evidence of a defendant's guilt, without post-indictment notice, is insufficient to persuade the court *not* to notice an error like that at issue here.") (emphasis in original).

at 189-90 (Motz, J., joined by Widener, Michael, and King, JJ.); *id.* at 167-69 (Niemeyer, J., joined by Gregory, J.).

C.

The government argues that we should decline to recognize the error in this case because the evidence adduced at trial overwhelmingly establishes the threshold drug quantities for an aggravated drug trafficking offense. While the government may well be correct as a factual matter, the quantum of evidence is not a relevant consideration when the error stems from a defect in the indictment.

First, a reviewing court may not speculate about whether a grand jury would or would not have indicted a defendant for a crime with which he was never charged. *See Promise*, 255 F.3d at 190 ("A court cannot rely on its own view of what indictment a grand jury could or would have issued if the grand jury was never presented with a charge, or what verdict a petit jury could or would have reached if the petit jury was never presented with an indictment.") (Motz, J., joined by Widener, Michael, and King, JJ.). To do so would usurp the role of the grand jury, which, as the Supreme Court has recognized, is "'not bound to indict in every case where a conviction can be obtained.'" *Vasquez v. Hillery*, 474 U.S. 254, 263, 106 S. Ct. 617, 88 L.Ed.2d 598 (1986) (quoting *United States v. Ciambrone*, 601

F.2d 616, 629 (2d Cir. 1979) (Friendly, J., dissenting)). For that reason, we explained in *Floresca* that "it is 'utterly meaningless' to posit that any rational jury *could* or *would* have indicted [the defendant for a different crime], because it is plain that this grand jury *did not*, and, absent waiver, a constitutional verdict cannot be had on an unindicted offense." 38 F.3d at 712 (emphasis in original).

Second, to the extent the government argues that we should decline to notice the error because the *petit jury* would have convicted appellants of an aggravated drug trafficking offense based on the overwhelming evidence adduced at trial, we reject that proposition as well. For the government's position ignores the basic principle that the grand jury and petit jury are separate and independent. Because it is well settled that the petit jury cannot usurp the role of the grand jury, it is no less evident that we cannot place ourselves in the position of the petit jury, and then, in turn, assume the role of the grand jury. In effect, this would result in nothing less than a constructive amendment of the indictment, *see Promise*, 255 F.3d at 167-68 (Niemeyer, J., joined by Gregory, J.), which itself is reversible plain error, *Floresca*, 38 F.3d at 714.

Accordingly, we vacate and remand for resentencing with instructions to sentence the appellants (except Darlene Green) to a term of imprisonment not to exceed 20 years.

IV.

After the appellants filed this appeal, they learned that James Gibson, one of the government's principal cooperating witnesses, may have lied on the witness stand. Specifically, Mary Koch, who had been designated as a Special Assistant United States Attorney to assist in the federal case against the appellants, admitted in a related state drug prosecution that she believed that Gibson's testimony at trial was inconsistent with the information he provided to the government prior to trial. According to Koch, Gibson had not been truthful in relating the involvement of his daughter, Matilda Hall, in the conspiracy.

After appellants learned of Koch's testimony, we stayed the appeal pending the district court's resolution of appellants' motion for a new trial based upon Gibson's allegedly perjurious testimony. After a full hearing on the matter, the district court denied appellants' motion, holding that even if the prosecution knowingly used perjured testimony, the materiality element for a due process violation had not been established because there was no "'reasonable likelihood that the false testimony could have affected the judgment of the jury.'" *United States v. White*, 238 F.3d 537, 540-41 (4th Cir. 2001) (quoting *Kyles v. Whitley*, 514 U.S. 419, 433 n.7, 115 S. Ct. 1555, 131 L.Ed.2d 490 (1995)). In denying the motion, the district court rendered detailed factual findings with regard to each appellant, specifically assessing the effect of Gibson's testimony on the trial, and the additional evidence supporting the verdicts.

Appellants argue that the district court erred in denying the motion for a new trial. We disagree. As dem-

onstrated by the district court's findings, the government presented overwhelming evidence—separate and apart from Gibson's testimony—establishing: (1) that each of the appellants participated in the conspiracy; (2) their respective roles in the conspiracy; and (3) the vast amounts of crack being distributed by them. *Cf. White*, 238 F.3d at 540 (holding that though the government may have failed to disclose exculpatory testimony, "in light of the overwhelming evidence" of defendant's involvement in narcotics sales, there was no reasonable probability that a defense based upon that testimony would have been successful). Consequently, Gibson's testimony was, in large measure, merely cumulative of the testimony provided by numerous other cooperating witnesses.[6]

Therefore, after thoroughly reviewing the record and the district court's findings, we affirm on the district court's reasoning that there is no "reasonable likelihood that the false testimony could have affected the judgment of the jury."

V.

Finally, Jovan Powell argues that the district court erred when it failed to strike the testimony of police officer Michael Fries, who recounted that when he stopped Powell, Powell was in the possession of a key to

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[6] Alternatively, appellants argue that they were entitled to a new trial under Fed. R. Crim. P. 33 on the basis of newly discovered evidence. This argument is without merit, however, because a new trial based upon newly discovered evidence is unavailable where "evidence . . . is merely cumulative or impeaching," absent exceptional circumstances which are not present in this case. *See United States v. Custis*, 988 F.2d 1355, 1359 (4th Cir. 1993).

a residence that contained vast quantities of crack cocaine. First, Powell asserts that Fries and his partner did not possess reasonable suspicion to perform an investigative stop under *Terry v. Ohio*, 392 U.S. 1, 88 S. Ct. 1868, 20 L.Ed.2d 889 (1968). Second, Powell contends that even if the officers had reasonable suspicion, they were not entitled to seize the key. We reject both of Powell's arguments.

A.

Under *Terry*, "[t]he police can stop and detain a person for investigative purposes 'if the officer has a reasonable suspicion supported by articulable facts that criminal activity may be afoot.'" *Park v. Shiflett*, 250 F.3d 843, 850 (4th Cir. 2001) (quoting *United States v. Sokolow*, 490 U.S. 1, 7, 109 S. Ct. 1581, 104 L.Ed.2d 1 (1989)). "While 'reasonable suspicion' is a less demanding standard than probable cause and requires a showing considerably less than preponderance of the evidence, the Fourth Amendment requires at least a minimal level of objective justification for making the stop." *Illinois v. Wardlow*, 528 U.S. 119, 120 S. Ct. 673, 675-76, 145 L.Ed.2d 570 (2000).

Here, the evidence establishes that Fries and his partner had reasonable suspicion to perform a *Terry* stop. Fries, an experienced street crimes and drug enforcement investigator, testified that he knew, based on his prior experience patrolling the area on "almost a daily basis," J.A. 101, that Powell was leaving a residence located in a "problem[ ]" neighborhood, J.A. 101. *See United States v. Lender*, 985 F.2d 151, 154 (4th Cir. 1993) ("Courts are not remiss in crediting the practical experience of officers who observe on a daily basis what transpires on the street."). Consequently, when

he noticed that the dwelling contained "busted out" windows and a pit bull "looking out of the front windows upstairs," J.A. 108, Fries and his partner decided to leave their patrol car and investigate the situation. When they approached Powell, Fries "questioned him as to what he was doing inside the house." J.A. 110. Powell then became visibly nervous "and answered . . . by stating he didn't live there and he wasn't in there." J.A. 111.

In denying Powell's motion to strike Fries' testimony, the district court explained that since the officers had actually witnessed Powell leaving the residence, they "had reason to believe [Powell] was lieing [sic] to them," and that Powell's dubious response coupled with the suspicious circumstances of the encounter furnished the officers with reasonable suspicion to believe that "criminal activity may be afoot." S.A. 37.

Hence, we agree with the district court that, based upon the officers' observations, they possessed reasonable suspicion to perform a *Terry* stop.

B.

Powell alternatively argues that even if the *Terry* stop was supported by reasonable suspicion, the officers did not have the right to seize the key. Powell's assertion is without merit because the confiscation of the key was lawful under the "plain view" doctrine. *See Minnesota v. Dickerson*, 508 U.S. 366, 374, 113 S. Ct. 2130, 124 L.Ed.2d 334 (1993) (extending the "plain view" doctrine to items seized pursuant to a lawful *Terry* stop).

"Under that doctrine, if police are lawfully in a position from which they view an object, if its incriminating

character is immediately apparent, and if the officers have a lawful right of access to the object, they may seize it without a warrant." *Id.* First, the officers were "lawfully in a position from which they view[ed]" the key, since they were merely driving by when they viewed the object in question. Indeed, Fries indicated during his testimony that the officers noticed the key in Powell's hand as Powell was exiting the residence, prior to when the officers left the patrol car. J.A. 108, 110.

Second, the object's "incriminating character [was] immediately apparent" after the officers' lawful encounter with Powell. When the officers inquired about Powell's presence in the house, his answer indicated not only that he had no possessory interest in the residence, but that, contrary to the officer's observations, he had not been present in the house either. Thus, it was "immediately apparent" to the officers that the key was "incriminating evidence" that might have been related to any number of crimes, *United States v. Jackson*, 131 F.3d 1105, 1109 (4th Cir. 1997), including, most notably, a burglary or some other type of property crime, *see, e.g.*, Md. Ann. Code art. 27, § 30 ("A person may not break and enter the storehouse of another with the intent to commit theft, a crime of violence, or arson in the second degree."); *see also Dorsey v. State*, 231 Md. 278, 189 A.2d 623, 624 (1963) ("'Actual breaking . . . may consist of lifting a latch, drawing a bolt, raising an unfastened window, *turning a key or knob*, pushing open a door kept closed merely by its own weight.'" (emphasis added)) (quoting L. Hochheimer, Criminal Law § 277, at 310 (2d ed. 1904)).

Third, the officers had a "lawful right of access to the object." As the Supreme Court has explained, this requirement "is simply a corollary of the familiar principle

. . . that no amount of probable cause can justify a warrantless search or seizure absent 'exigent circumstances.'" *Horton v. California*, 496 U.S. 128, 137 n.7, 110 S. Ct. 2301, 110 L.Ed.2d 112 (1990); *United States v. Legg*, 18 F.3d 240, 244 (4th Cir. 1994). Here, the officers had reasonable suspicion to believe not only that there was criminal activity, but that the key itself represented evidence of a crime. Thus, an exigent circumstance was unavoidably created because the key and any incriminatory evidence contained inside the house could have been destroyed had the officers not seized the key at that particular moment. *See Schmerber v. California*, 384 U.S. 757, 770-71, 86 S. Ct. 1826, 16 L.Ed.2d 908 (1966) (stating that the destruction of evidence is an exigency that justified a warrantless search); *Taylor*, 90 F.3d at 907 (holding that the threat of "imminent destruction of evidence of [criminal] activity" created an exigent circumstance).

Accordingly, we hold that neither the *Terry* stop nor the seizure of the key violated Powell's rights under the Fourth Amendment.

CONCLUSION

For the reasons stated herein, we affirm the convictions, and vacate and remand for resentencing with respect to all the appellants except Darlene Green.

It is so ordered.

WILKINSON, Chief Judge, concurring in part and dissenting in part:

I concur in the affirmance of the convictions.[1] I respectfully dissent from the decision in Part III to notice the sentencing error in this case. In light of the overwhelming evidence presented, the district court concluded that the defendants were responsible for the distribution of 1.5 kilograms of cocaine base—thirty times more than the 50 grams necessary under 21 U.S.C. § 841(b)(1)(A) to merit the sentences they received. Because it would constitute a manifest injustice to reduce these defendants' sentences when the evidence undeniably demonstrates that they committed the greater statutory offense, I would decline to notice the error.

I.

Seven of the eight appellants challenge their sentences with *Apprendi* claims. Despite an allegation of drug quantity in the initial indictment, a drug quantity was not alleged in the superseding indictment nor found by the petit jury beyond a reasonable doubt. All of the appellants were sentenced to terms of imprisonment that exceed the twenty-year maximum set forth in 21 U.S.C. § 841(b)(1)(C) for unspecified drug quantities. Five of the appellants, Stanley Hall Jr., Leonard Cotton, Lamont Thomas, Marquette Hall, and Jesus Hall, were sentenced to life imprisonment. Two others, Jovan Powell and Matilda Hall, were sentenced to 30 years imprisonment. The appellants did not raise this challenge in the district court because the Supreme Court had not yet decided *Apprendi*.

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[1] In doing so, I join in all but Part III of the majority opinion.

Under *United States v. Olano*, 507 U.S. 725, 113 S. Ct. 1770, 123 L.Ed.2d 508 (1993), before an appellate court can correct an error not raised at trial, "there must be (1) error, (2) that is plain, and (3) that affect[s] substantial rights." *Johnson v. United States*, 520 U.S. 461, 466-67, 117 S. Ct. 1544, 137 L.Ed.2d 718 (1997) (alteration in original) (internal quotations omitted). "If all three conditions are met, an appellate court may then exercise its discretion to notice a forfeited error, but only if (4) the error seriously affect[s] the fairness, integrity, or public reputation of judicial proceedings." *Id.* (alteration in original) (internal quotations omitted).

Under the reasoning of this court's recent decision in *United States v. Promise*, 255 F.3d 150 (4th Cir. 2001) (en banc), the district court committed plain error in sentencing the defendants to more than the twenty-year maximum permitted by 21 U.S.C. § 841(b)'s catch-all provision. *See Promise*, 255 F.3d at 159-60; 21 U.S.C. § 841(b)(1)(C) (maximum sentence of imprisonment of not more than twenty years if drug quantity has not been determined by a jury beyond a reasonable doubt). Furthermore, *Promise* makes clear that this error affected the defendants' substantial rights. *See Promise*, 255 F.3d at 160-62.

I do not believe, however, that this court ought to notice the error in this case. Quite simply, there is no question that the defendants participated in a conspiracy to distribute more than 50 grams of cocaine base. In fact, the evidence is overwhelming that the quantity of drugs in question exceeded § 841(b)(1)(A)'s "threshold" amount. The majority does not dispute this point and in fact acknowledges the overwhelming nature of the evidence against the defendants. *See ante* at 402-03 (noting that "approximately 380 grams of

cocaine base and 85 grams of cocaine hydrochloride *were actually seized* from the various conspirators"); *ante* at 408 (stating that there was "overwhelming evidence" apart from cooperating coconspirator James Gibson's testimony establishing "the vast amounts of crack distributed by [the defendants]").

Courts may decline to notice a plain error when evidence of defendants' guilt is overwhelming. *See*, e.g., *Johnson*, 520 U.S. at 469-70, 117 S. Ct. 1544 (refusing to notice plain error when evidence of guilt was "overwhelming" and largely uncontested); *United States v. Bowens*, 224 F.3d 302, 314-15 (4th Cir. 2000) (same); *United States v. Johnson*, 219 F.3d 349, 354 (4th Cir. 2000) (same); *United States v. Cedelle*, 89 F.3d 181, 186 (4th Cir. 1996) (declining to notice plain error and stating that "[c]entral" to the question of whether to notice a plain error affecting substantial rights "is a determination of whether, based on the record in its entirety, the proceedings against the accused resulted in a fair and reliable determination of guilt"); *United States v. Nance*, 236 F.3d 820, 823, 826 (7th Cir. 2000) (declining to recognize plain error of sentencing defendant to more than the twenty-years provided by 21 U.S.C. § 841(b)(1)(C) where the indictment did not state any drug quantity because the evidence against defendant was overwhelming); *United States v. Mojica-Baez*, 229 F.3d 292, 307-12 (1st Cir. 2000) (declining to notice error when indictment failed to charge defendant for using a semi-automatic weapon). *See also Promise*, 255 F.3d at 160-65 (Wilkins, J., joined by Wilkinson, Williams, and Traxler, JJ.).

Here, the government presented, *inter alia*, testimony from seven of the defendants' coconspirators[2] and thirty-five Baltimore City police officers and FBI agents about the nature and extent of the defendants' far-flung narcotics enterprise. Among the most incriminating evidence regarding the quantity of cocaine base (crack) is the following:

- Carla Malloy testified that in the summer of 1996 she went to a Marriott hotel in Baltimore with defendants Stanley Hall Jr., Leonard Cotton, Lamont Thomas, Jesus Hall, and Nicole Baylor. At the hotel, the group bagged one kilogram of cocaine base into ziplocks. Baylor confirmed the occurrence of this incident.

- Malloy testified that she later went to a Super 8 motel with Hall Jr. and Jesus Hall to bag one-half of a kilogram of crack.

- Baylor testified that she too bagged crack on a second occasion with Thomas at a Super 8 motel. During this incident, they bagged one kilogram of crack given to them by Hall Jr.

- Korey Britton testified that from mid-November 1996 to December 27, 1996, he sold approximately $10,000 to $12,000 of crack per week as a street runner for Hall Jr.

- Malloy testified that between December 1996 and midJanuary 1997, Hall Jr. provided crack to Cotton and Thomas in quantities of one-eighth of a kilogram (125 grams).

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[2] The following coconspirators served as government witnesses: Carla Malloy, Nicole Baylor, Korey Britton, Timothy Roday, James Gibson, Kowana Huntley, and Roxanne Kennedy.

- Malloy also testified that after January 1997 she was present on four occasions when Hall Jr. cooked cocaine powder into crack. Thomas was present on two of these occasions.

- Malloy further testified that during that same time period, she and Thomas purchased ounce quantities (28 grams) of crack from Hall Jr. for distribution.

- Britton testified that he was with Hall Jr. when Hall Jr. cooked one-quarter of a kilogram of cocaine powder into crack. Hall Jr. and Britton then delivered the crack to Cotton.

- Timothy Roday testified that in 1996 and 1997, Matilda Hall either personally provided him with crack or directed him to pick up drugs from one of her sons or their workers. Roday estimated that during this time he paid Matilda Hall a total of approximately $15,000 for the crack cocaine he purchased from her and the Hall Jr. organization.

- Britton and Malloy both testified that they retrieved crack from the inside of 847 McHenry Street for Matilda Hall. Malloy stated that she took a pocketbook that contained one-quarter ounce (7 grams) of crack cocaine out of a linen closet.

- Britton testified that he delivered one-eighth of an ounce (3.5 grams) of crack to Darlene Green at Matilda Hall's request. On another occasion, Matilda Hall took an 8 ball (3.5 grams) of crack out of her bra and asked Britton to hide it for her in the trash.

- The testimony of the cooperating coconspirators was corroborated by numerous Baltimore City police officers. In particular, various state arrests and searches between February 1996 and April 1997 resulted in the seizure of a combination of 795 ziplock

bags and clear bags containing approximately 380 grams of cocaine base.

- Additionally, pursuant to a federal search warrant of Jovan Powell's residence executed on October 17, 1997, the government seized 51.3 grams of crack found in a pair of Powell's sweat pants.

- Finally, during sentencing, the defendants did not argue that the conspiracy distributed less than 50 grams of cocaine base. Various defendants disputed the amount of crack that should be attributed to them based on their role in the conspiracy. They also argued that the cooperating co-conspirators' testimony should not be credited. However, none of them disputed the amount of crack actually seized by the police officers and federal agents.

It is true that the superseding indictment did not specify the amount of drugs in question. Nor did the government subsequently file an information contending that defendants were accountable for more than 50 grams of cocaine base. Still, contrary to the majority's assertion, *see ante* at 407 n.5, it remains difficult to believe that defendants lacked notice that they faced 21 U.S.C. § 841(b)'s strictest penalties. First, all seven of these defendants received actual notice from the initial indictment, which specified the threshold drug quantity with which they were charged. Specifically, the initial indictment charged defendants with conspiring to "distribute and possess with intent to distribute . . . 50 grams or more of a mixture or substance containing a detectable amount of cocaine base . . . in violation of Title 21, United States Code, § 841(a)(1)." Second, because the government was presenting evidence that the defendants distributed 1.5 kilograms of cocaine base and 150 kilograms of cocaine, defendants' counsel

clearly were aware that the government could seek the elevated penalties available under 21 U.S.C. § 841(b)(1)(A). Given the overwhelming evidence and the lack of any unfairness to the defendants, I would not recognize the error.

There is no injustice in holding these defendants accountable for participating in a conspiracy to distribute more than 50 grams of cocaine base. The true injustice comes from this court reducing their sentences and ignoring the effects that their vast drug distribution ring had upon the citizens of Baltimore. Ignoring the evidence and the societal effects of the defendants' actions is what "seriously affects the fairness, integrity [and] public reputation of judicial proceedings." *Olano*, 507 U.S. at 732, 113 S. Ct. 1770 (internal quotations omitted).

II.

The majority does not make a case of injustice based on the facts of this case and does not argue that the defendants are not accountable for the drug quantity the district court attributed to them. Instead, the majority focuses solely on the nature of the error—the failure of the superseding indictment to allege a specific drug quantity—in reaching its conclusion to recognize the plain error. I agree fully with the majority's statements about the general importance of a defendant's right to be indicted by a grand jury. However, in the course of its tribute to grand jury indictments, the majority misses two crucial points.

First, the indictment in this case was valid at the time it was filed. "It is one thing to vacate a conviction or sentence where the prosecutor failed to indict in accordance with the current state of the law. It is quite

another thing to vacate a conviction or sentence based on an indictment that was entirely proper at the time." *United States v. Mojica-Baez*, 229 F.3d 292, 310 (1st Cir. 2000). The government had no way to predict the about-face that would later be undertaken by the Supreme Court in *Apprendi* and by this court in *Promise*.

There can be no doubt that had the prosecution been aware of the rule this court would later announce in *Promise*, it would have made certain that the superseding indictment mirrored the initial indictment. Specifically, it would have included the statement from the initial indictment that defendants conspired to "distribute and possess with intent to distribute . . . 50 grams or more of a mixture or substance containing a detectable amount of cocaine base." Nor is there any question, given the overwhelming evidence, that had the prosecutor included this language the grand jury would have indicted the defendants and the petit jury would have found the defendants guilty beyond a reasonable doubt.

Second, the majority inappropriately replaces the discretionary, case-by-case assessment dictated by the fourth prong of *Olano* with an essentially categorical approach when the error consists of an indictment defect. The Supreme Court has stressed that an appellate court must exercise discretion under Rule 52(b) when deciding whether to recognize a plain error that affects a defendant's substantial rights. *See Olano*, 507 U.S. at 737, 113 S. Ct. 1770 (stating that "a plain error affecting substantial rights does not, without more, satisfy the [requirement that the error seriously affect the fairness, integrity, or public reputation of judicial proceedings], for otherwise the discretion afforded by Rule 52(b) would be illusory"); *United States v. Young*, 470 U.S. 1, 16 n.14, 105 S. Ct. 1038, 84 L.Ed.2d 1 (1985) (stating that a "per se approach to plain-error review is flawed"). *See also United States v. David*, 83 F.3d 638, 648 (4th Cir. 1996) ("It seems to us, as apparently it did to the Court in *Olano*, that only by examining the particulars of each case can the 'careful balancing' reflected in the plain error rule be preserved."); *United States v. Patterson*, 241 F.3d 912, 913 (7th Cir. 2001) ("When the appellate standard is plain error (as opposed to harmless error), even the clearest of blunders never *requires* reversal; it just *permits* reversal.").

For the majority to select a category of errors a priori that must be corrected on plain error review is inconsistent with the mandate of *Olano* to examine the facts of each case and the proceeding as a whole. Its approach cannot be squared with that of the Supreme Court. The Supreme Court knows how to adopt categorical approaches and has indicated a willingness to do so under the third prong of *Olano*. *See Johnson*, 520 U.S. at 468-69, 117 S. Ct. 1544 (recognizing categorical approach to structural errors that presumptively satisfy the third prong of *Olano* and listing classes of cases that present structural errors). However, the Court has never adopted a categorical approach under the fourth prong of *Olano*. Furthermore, the Court did not include indictment defects in its list of structural errors. *See Johnson*, 520 U.S. at 468-69, 117 S. Ct. 1544 (gathering "very limited class of cases" that present structural errors). Thus, it is hard to believe that the Supreme Court would require all indictment defects to be noticed under the fourth prong of *Olano* when they do not even

qualify as structural errors that affect a defendant's substantial rights under prong three.

In *Johnson*, the petitioner argued that *Olano* did not apply because the error she complained of was structural. *Id.* at 466, 117 S. Ct. 1544. The Supreme Court rejected this argument and stated that "the seriousness of the error claimed does not remove consideration of it from the ambit of the Federal Rules of Criminal Procedure." *Id.* The Court went on to apply *Olano* based on the specific facts of the case. *See id.* at 469-70, 117 S. Ct. 1544 (holding that even if the error complained of was structural and affected substantial rights, the fourth prong of *Olano* was not met because of the "overwhelming" and "essentially uncontroverted" evidence of petitioner's guilt). Indictment defects will justify recognition on plain error review in some cases. However, in cases such as this one, the indictment defect has not affected the fairness of the proceedings and should not be noticed. Moreover, other errors not selectively culled by the majority for categorical treatment under the fourth prong of *Olano* may potentially have a severe impact on the fairness and integrity of judicial proceedings in a particular case. This is why the *Olano* case-specific inquiry is critical.

The majority stresses that the Supreme Court in *Silber v. United States*, 370 U.S. 717, 82 S. Ct. 1287, 8 L.Ed.2d 798 (1962), found reversible plain error when an indictment did not charge the defendant with a crime. *See Silber*, 370 U.S. at 717-18, 82 S. Ct. 1287. However, the Court did not hold that all grand jury errors must be recognized on plain error review or that every failure of an indictment to charge all of the elements required for a defendant's sentence must be noticed by an appellate court. Furthermore, several of

our sister circuits have declined to recognize plain error when defendants were sentenced more strictly based on elements not charged in their indictments. The First, Seventh, and Eleventh Circuits have properly recognized that this type of indictment defect may have only the most negligible effect on the fairness and integrity of a judicial proceeding. *See Mojica-Baez*, 229 F.3d at 310-12 (declining to notice plain error when indictment failed to charge defendant for using a semi-automatic weapon during a robbery because there was no objection at trial, no lack of notice, and "no reason to think the grand jury would have had any trouble in rendering an indictment specifying the weapons used"); *United States v. Nance*, 236 F.3d 820, 823, 826 (7th Cir. 2000) (declining to recognize plain error of sentencing defendant to more than twenty years when indictment did not state any drug quantity because the evidence against defendant was overwhelming); *United States v. Patterson*, 241 F.3d 912, 914 (7th Cir. 2001) (same); *United States v. Swatzie*, 228 F.3d 1278, 1284 (11th Cir. 2000) (stating that even if district court's *Apprendi* error with regard to defendant's drug conviction satisfied the first three steps of the *Olano* analysis, the court would decline to notice the error due to overwhelming evidence of defendant's guilt).

III.

The injustices of reducing the defendants' terms of imprisonment from life or thirty years to a twenty-year maximum are manifold. The majority errs by not weighing these injustices against the gravity of the indictment defect. The integrity of this country's criminal justice system depends on the most culpable violators receiving more stringent punishments than

those less-culpable violators. In this case, the evidence is clear that defendant Stanley Hall Jr. was the kingpin of a drug conspiracy that distributed over thirty times the statutorily required amount of crack cocaine to warrant a life sentence. Under Congress' intended sentencing scheme, Hall Jr. and the conspiracy's other key players justifiably received more stringent penalties than those individuals who were less essential to the conspiracy's success. However, by reducing their sentences under 21 U.S.C. § 841(b), this court erases the differences in punishment and condemnation between the conspiracy's kingpin and its underlings.

Moreover, changing the rules of the game after it has already been fairly played does a profound disservice to the individuals whose lives have been affected by the drug trade. In one sweeping motion, this court nullifies the sacrifices made by law enforcement officers, prosecutors, and trial courts in enforcing this country's drug laws. Furthermore, the majority overlooks the ultimate sacrifice paid by the victims of the drug trade. Seen as part of the overall drug problem, the drugs at issue here may be a mere drop in the bucket. But seen in terms of individual lives, the consequences of this sort of drug distribution are incalculable. Though the victims may be unknown and unnamed insofar as this record is concerned, as a result of the defendants' crimes, some individuals somewhere are spending their lives in the service of a chemical addiction.

Congress has properly expressed its condemnation of drug distributions and their consequences. And it has calibrated the penalties associated with drug distribution so that kingpins are punished more vigorously than petty dealers. It is unfortunate to disregard Congress' clear intent when there is no question at all

that the defendants here distributed the requisite drug amounts under 21 U.S.C. § 841(b) to merit the sentences they received. Under *Olano*, we are to notice a plain error only if a miscarriage of justice would result. Here, the true miscarriage of justice is the court's failure to respect Congress' attempt to deal with a problem which so compromises the life prospects of America's most vulnerable citizens.

APPENDIX B

Section 841(a) and (b) of Title 21 of the United States Code (1994 & Supp. V) provides:

(a) Unlawful acts

Except as authorized by this subchapter, it shall be unlawful for any person knowingly or intentionally—

(1) to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance; or

(2) to create, distribute, or dispense, or possess with intent to distribute or dispense, a counterfeit substance.

(b) Penalties

Except as otherwise provided in section 849, 859, 860, or 861 of this title, any person who violates subsection (a) of this section shall be sentenced as follows:

(1)(A) In the case of a violation of subsection (a) of this section involving—

(i) 1 kilogram or more of a mixture or substance containing a detectable amount of heroin;

(ii) 5 kilograms or more of a mixture or substance containing a detectable amount of—

(I) coca leaves, except coca leaves and extracts of coca leaves from which cocaine, ecgonine, and derivatives of ecgonine or their salts have been removed;

(II) cocaine, its salts, optical and geometric isomers, and salts of isomers;

(III) ecgonine, its derivatives, their salts, isomers, and salts of isomers; or

(IV) any compound, mixture, or preparation which contains any quantity of any of the substances referred to in subclauses (I) through (III);

(iii) 50 grams or more of a mixture or substance described in clause (ii) which contains cocaine base;

(iv) 100 grams or more of phencyclidine (PCP) or 1 kilogram or more of a mixture or substance containing a detectable amount of phencyclidine (PCP);

(v) 10 grams or more of a mixture or substance containing a detectable amount of lysergic acid diethylamide (LSD);

(vi) 400 grams or more of a mixture or substance containing a detectable amount of N-phenyl-N-[1-(2-phenylethyl)-4-piperidinyl] propanamide or 100 grams or more of a mixture or substance containing a detectable amount of any analogue of N-phenyl-N-[1-(2-phenylethyl)-4-piperidinyl] propanamide;

(vii) 1000 kilograms or more of a mixture or substance containing a detectable amount of marihuana, or 1,000 or more marihuana plants regardless of weight; or

(viii) 50 grams or more of methamphetamine, its salts, isomers, and salts of its

isomers or 500 grams or more of a mixture or substance containing a detectable amount of methamphetamine, its salts, isomers, or salts of its isomers;

such person shall be sentenced to a term of imprisonment which may not be less than 10 years or more than life and if death or serious bodily injury results from the use of such substance shall be not less than 20 years or more than life, a fine not to exceed the greater of that authorized in accordance with the provisions of title 18 or $4,000,000 if the defendant is an individual or $10,000,000 if the defendant is other than an individual, or both. If any person commits such a violation after a prior conviction for a felony drug offense has become final, such person shall be sentenced to a term of imprisonment which may not be less than 20 years and not more than life imprisonment and if death or serious bodily injury results from the use of such substance shall be sentenced to life imprisonment, a fine not to exceed the greater of twice that authorized in accordance with the provisions of title 18 or $8,000,000 if the defendant is an individual or $20,000,000 if the defendant is other than an individual, or both. If any person commits a violation of this subparagraph or of section 849, 859, 860, or 861 of this title after two or more prior convictions for a felony drug offense have become final, such person shall be sentenced to a mandatory term of life imprisonment without release and fined in accordance with the preceding sentence. Any sentence under this subparagraph shall, in the absence of such a prior conviction, impose a term of supervised release of at least 5 years in addition to such term of imprisonment and shall, if there was

such a prior conviction, impose a term of supervised release of at least 10 years in addition to such term of imprisonment. Notwithstanding any other provision of law, the court shall not place on probation or suspend the sentence of any person sentenced under this subparagraph. No person sentenced under this subparagraph shall be eligible for parole during the term of imprisonment imposed therein.

(B) In the case of a violation of subsection (a) of this section involving—

(i) 100 grams or more of a mixture or substance containing a detectable amount of heroin;

(ii) 500 grams or more of a mixture or substance containing a detectable amount of—

(I) coca leaves, except coca leaves and extracts of coca leaves from which cocaine, ecgonine, and derivatives of ecgonine or their salts have been removed;

(II) cocaine, its salts, optical and geometric isomers, and salts of isomers;

(III) ecgonine, its derivatives, their salts, isomers, and salts of isomers; or

(IV) any compound, mixture, or preparation which contains any quantity of any of the substances referred to in subclauses (I) through (III);

(iii) 5 grams or more of a mixture or substance described in clause (ii) which contains cocaine base;

(iv) 10 grams or more of phencyclidine (PCP) or 100 grams or more of a mixture or substance containing a detectable amount of phencyclidine (PCP);

(v) 1 gram or more of a mixture or substance containing a detectable amount of lysergic acid diethylamide (LSD);

(vi) 40 grams or more of a mixture or substance containing a detectable amount of N-phenyl-N-[1-(2-phenylethyl)-4-piperidinyl] propanamide or 10 grams or more of a mixture or substance containing a detectable amount of any analogue of N-phenyl-N-[1-(2-phenylethyl)-4-piperidinyl] propanamide;

(vii) 100 kilograms or more of a mixture or substance containing a detectable amount of marihuana, or 100 or more marihuana plants regardless of weight; or

(viii) 5 grams or more of methamphetamine, its salts, isomers, and salts of its isomers or 50 grams or more of a mixture or substance containing a detectable amount of methamphetamine, its salts, isomers, or salts of its isomers;

such person shall be sentenced to a term of imprisonment which may not be less than 5 years and not more than 40 years and if death or serious bodily injury results from the use of such substance shall be not less than 20 years or more than life, a fine not to exceed the greater of that authorized in accordance with the provisions of title 18 or $2,000,000 if the defendant is an individual or $5,000,000 if the defendant is other than an individual, or both. If any person commits such a violation after a prior conviction for a felony drug offense has become final, such person shall be sentenced to a term of imprisonment which may not be less than 10 years and not more than life imprisonment and if death or serious bodily injury results from the use of such substance shall be sentenced to life imprisonment, a fine not to exceed the greater of twice that authorized in accordance with the provisions of title 18 or $4,000,000 if the defendant is an individual or $10,000,000 if the defendant is other than an individual, or both. Any sentence imposed under this subparagraph shall, in the absence of such a prior conviction, include a term of supervised release of at least 4 years in addition to such term of imprisonment and shall, if there was such a prior conviction, include a term of supervised release of at least 8 years in addition to such term of imprisonment. Notwithstanding any other provision of law, the court shall not place on probation or suspend the sentence of any person sentenced under this subparagraph. No person sentenced under this subparagraph shall be eligible for parole during the term of imprisonment imposed therein.

(C) In the case of a controlled substance in schedule I or II, or 1 gram of flunitrazepam, except as provided in subparagraphs (A), (B), and (D), such person shall be sentenced to a term of imprisonment of not more than 20 years and if death or serious bodily injury results from the use of such substance shall be sentenced to a term of imprisonment of not less than twenty years or more than life, a fine not to exceed the greater of that authorized in accordance with the provisions of title 18 or $1,000,000 if the defendant is an individual or $5,000,000 if the de-

fendant is other than an individual, or both. If any person commits such a violation after a prior conviction for a felony drug offense has become final, such person shall be sentenced to a term of imprisonment of not more than 30 years and if death or serious bodily injury results from the use of such substance shall be sentenced to life imprisonment, a fine not to exceed the greater of twice that authorized in accordance with the provisions of title 18 or $2,000,000 if the defendant is an individual or $10,000,000 if the defendant is other than an individual, or both. Any sentence imposing a term of imprisonment under this paragraph shall, in the absence of such a prior conviction, impose a term of supervised release of at least 3 years in addition to such term of imprisonment and shall, if there was such a prior conviction, impose a term of supervised release of at least 6 years in addition to such term of imprisonment. Notwithstanding any other provision of law, the court shall not place on probation or suspend the sentence of any person sentenced under the provisions of this subparagraph which provide for a mandatory term of imprisonment if death or serious bodily injury results, nor shall a person so sentenced be eligible for parole during the term of such a sentence.

(D) In the case of less than 50 kilograms of marihuana, except in the case of 50 or more marihuana plants regardless of weight, 10 kilograms of hashish, or one kilogram of hashish oil or in the case of any controlled substance in schedule III, or 30 milligrams of flunitrazepam, such person shall, except as provided in paragraphs (4) and (5) of this subsection, be sentenced to a term of imprisonment

of not more than 5 years, a fine not to exceed the greater of that authorized in accordance with the provisions of title 18 or $250,000 if the defendant is an individual or $1,000,000 if the defendant is other than an individual, or both. If any person commits such a violation after a prior conviction for a felony drug offense has become final, such person shall be sentenced to a term of imprisonment of not more than 10 years, a fine not to exceed the greater of twice that authorized in accordance with the provisions of title 18 or $500,000 if the defendant is an individual or $2,000,000 if the defendant is other than an individual, or both. Any sentence imposing a term of imprisonment under this paragraph shall, in the absence of such a prior conviction, impose a term of supervised release of at least 2 years in addition to such term of imprisonment and shall, if there was such a prior conviction, impose a term of supervised release of at least 4 years in addition to such term of imprisonment.

(2) In the case of a controlled substance in schedule IV, such person shall be sentenced to a term of imprisonment of not more than 3 years, a fine not to exceed the greater of that authorized in accordance with the provisions of title 18 or $250,000 if the defendant is an individual or $1,000,000 if the defendant is other than an individual, or both. If any person commits such a violation after one or more prior convictions of him for an offense punishable under this paragraph, or for a felony under any other provision of this subchapter or subchapter II of this chapter or other law of a State, the United States, or a foreign country relating to narcotic drugs, marihuana, or depressant or stimulant substances, have

become final, such person shall be sentenced to a term of imprisonment of not more than 6 years, a fine not to exceed the greater of twice that authorized in accordance with the provisions of title 18 or $500,000 if the defendant is an individual or $2,000,000 if the defendant is other than an individual, or both. Any sentence imposing a term of imprisonment under this paragraph shall, in the absence of such a prior conviction, impose a term of supervised release of at least one year in addition to such term of imprisonment and shall, if there was such a prior conviction, impose a term of supervised release of at least 2 years in addition to such term of imprisonment.

(3) In the case of a controlled substance in schedule V, such person shall be sentenced to a term of imprisonment of not more than one year, a fine not to exceed the greater of that authorized in accordance with the provisions of title 18 or $100,000 if the defendant is an individual or $250,000 if the defendant is other than an individual, or both. If any person commits such a violation after one or more convictions of him for an offense punishable under this paragraph, or for a crime under any other provision of this subchapter or subchapter II of this chapter or other law of a State, the United States, or a foreign country relating to narcotic drugs, marihuana, or depressant or stimulant substances, have become final, such person shall be sentenced to a term of imprisonment of not more than 2 years, a fine not to exceed the greater of twice that authorized in accordance with the provisions of title 18 or $200,000 if the defendant is an individual or $500,000 if the defendant is other than an individual, or both.

(4) Notwithstanding paragraph (1)(D) of this subsection, any person who violates subsection (a) of this section by distributing a small amount of marihuana for no remuneration shall be treated as provided in section 844 of this title and section 3607 of title 18.

(5) Any person who violates subsection (a) of this section by cultivating a controlled substance on Federal property shall be imprisoned as provided in this subsection and shall be fined any amount not to exceed—

(A) the amount authorized in accordance with this section;

(B) the amount authorized in accordance with the provisions of title 18;

(C) $500,000 if the defendant is an individual; or

(D) $1,000,000 if the defendant is other than an individual;

or both.

(6) Any person who violates subsection (a) of this section, or attempts to do so, and knowingly or intentionally uses a poison, chemical, or other hazardous substance on Federal land, and, by such use—

(A) creates a serious hazard to humans, wildlife, or domestic animals,

(B) degrades or harms the environment or natural resources, or

(C) pollutes an aquifer, spring, stream, river, or body of water,

shall be fined in accordance with title 18, or imprisoned not more than five years, or both.

(7) **Penalties for distribution.**

(A) **In general.** Whoever, with intent to commit a crime of violence, as defined in section 16 of title 18 (including rape), against an individual, violates subsection (a) of this section by distributing a controlled substance to that individual without that individual's knowledge, shall be imprisoned not more than 20 years and fined in accordance with title 18.

(B) **Definition.** For purposes of this paragraph, the term "without that individual's knowledge" means that the individual is unaware that a substance with the ability to alter that individual's ability to appraise conduct or to decline participation in or communicate unwillingness to participate in conduct is administered to the individual.

Section 846 of Title 21 of the United States Code provides:

§ 846 Attempt and conspiracy

Any person who attempts or conspires to commit any offense defined in this subchapter shall be subject to the same penalties as those prescribed for the offense, the commission of which was the object of the attempt or conspiracy.

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BRIEF IN OPPOSITION

Leonard Cotton, Marquette Hall, Lamont Thomas, Matilda Hall, Jovan Powell, Jesus Hall and Stanley Hall, Jr., (hereinafter referred to as "Respondents"), submit their Brief in Opposition to the Petition for Writ of Certiorari filed by the United States of America, (hereinafter referred to as "Petitioner"), to review the judgment of the United States Court of Appeals for the Fourth Circuit. For the reasons set forth, the Petition should be denied because there are no compelling reasons for further appellate review.

STATEMENT OF FACTS

For the purposes of this Brief in Opposition, the Respondents adopt and incorporate by reference the relevant facts set forth in the reported opinion rendered by the United States Court of Appeals for the Fourth Circuit, decided August 10, 2001, in *United States of America v. Leonard Cotton, et al.*, 261 F.3d 397 (4th Cir. 2001). The decision is reprinted in Appendix A to the Petition for Writ of Certiorari. Pet. App. A at 1a-35a.

REASONS FOR DENYING THE PETITION FOR WRIT OF CERTIORARI

The Petitioner states explicitly that it wishes this Court to examine "[t]he recurring questions of how to treat indictment errors…." Pet. at 22. What the Petitioner does not state - but implicitly wishes - is that this Court determine the future viability and, for that matter, integrity of the grand jury indictment process. By doing so, the Petitioner challenges the Fifth Amendment's safeguard that a defendant be tried and sentenced for only those crimes as returned by an indictment. The Petitioner desires that this Court use this narrow *Apprendi* indictment error case, which is incapable of frequent re-occurrence, as the vehicle to now re-explore how courts should treat indictment errors generally. Unfortunately for the Petitioner, the instant case is not the case for such a sweeping examination of how legally defective indictments should be examined on appellate review.

There are three compelling reasons why this Court should deny the Petition.

I.

DESPITE THE CONFLICT OF THE COURTS OF APPEALS, THE DECISION BELOW REPRESENTS BUT A RELATIVELY SMALL NUMBER OF FEDERAL CRIMINAL CASES AFFECTED BY *APPRENDI V. NEW JERSEY* AND WILL NOT FREQUENTLY RE-OCCUR IN FUTURE FEDERAL CRIMINAL CASES AND ITS UNIQUENESS SHOULD PRECLUDE REVIEW BY THIS COURT.

It cannot be reasonably disputed that the decision below deals with a relatively limited universe of federal criminal cases that were pending in the district court or were on direct appellate review when the Court issued the decision in *Apprendi v. New Jersey*, 530 U.S. 466 (2000).

In recognition of the *Appendi* decision, the Petitioner necessarily makes certain concessions: (1) that post-*Apprendi*, the courts of appeals have uniformly held that drug quantities must be charged in the indictment and proven to a jury beyond a reasonable doubt to support an enhancement above the otherwise statutory maximum sentence; and (2) that the Petitioner now accepts the logic of *Apprendi*, the statutory scheme set forth in 21 U.S.C. §841 and that "*Apprendi* requires drug quantity to be charged in a federal indictment to support an increase in the statutory maximum sentence." Pet. at 10.

Since the decision of the Fourth Circuit properly applied *Apprendi* and the Petitioner readily concedes that federal prosecutors now know how to charge 21 U.S.C. §841 offenses and obtain indictments from the grand jury in federal courts, there is no call for review by this Court. It is unlikely that the type of factual circumstances presented in this case will regularly re-occur in federal courts. As such, this case does not rise to such a level to warrant this Court's consideration.

II.

IN ITS QUESTION PRESENTED, THE PETITIONER RELIES ON THE MISSTATEMENT OF FACT THAT THE RESPONDENTS DID NOT OBJECT TO THE SENTENCES IN THE DISTRICT COURT AND THAT THE RESPONDENTS HAD NOTICE THAT THE GOVERNMENT COULD SEEK ENHANCED SENTENCES BASED ON DRUG QUANTITY.

In formulating its question presented, the Petitioner relies incorrectly on two faulty factual assertions.

The first is that the Respondents did not object to the sentences in the district court. Pet. at 11. The amount of drug quantity attributable to each of the Respondents was indeed a contested issue at the sentencing hearings in the district court. In a chronological sense, perhaps, the Petitioner may be correct since each of the Respondents were sentenced pre-*Apprendi*. It does not, however, matter, since *Apprendi* was decided while this case

was pending on direct appeal. *Griffith v. Kentucky*, 479 U.S. 314 (1997).

Closely related to the first misstatement of fact is the second that the "defendants did not contest the evidence while on notice of the need to do so." Pet. at 8. This is not correct. Even Chief Judge Wilkinson, in dissent, acknowledged that "[v]arious defendants disputed the amount of crack that should be attributed to them based on their role in the conspiracy." Pet. App. A at 28a.

Contrary to the Petitioner's assertions, this instant case is not a case where any of the Respondents agreed to drug quantity and/or waived the drug quantity issue, or for that matter, had notice that the government could seek an enhanced sentence.

III.

THE FOURTH CIRCUIT WAS CORRECT IN FINDING THAT THE *APPRENDI* INDICTMENT ERROR STEMMED FROM A DEFECT IN THE INDICTMENT AND THAT SUCH AN ERROR "SERIOUSLY AFFECTS THE FAIRNESS, INTEGRITY, OR PUBLIC REPUTATION OF THE JUDICIAL PROCEEDINGS" SINCE THE RESPONDENTS WERE SENTENCED FOR A CRIME THAT THEY WERE NEITHER CHARGED NOR CONVICTED IN VIOLATION OF THE FIFTH AMENDMENT.

Even though the Petitioner appears to have made certain concessions adhering to *Apprendi*, to wit, that drug quantity must be charged in the indictment by the grand jury and proven by the government beyond a reasonable doubt

to the petit jury, it still persists to resist this Court's direction that drug quantity is an "element" of an §841 offense and not merely "a fact that was not alleged in the indictment." Pet. at 7. It is transparent that the Petitioner's true motivation in asking this Court to review this case is not so much the Fourth Circuit's opinion or this Court's decision in *Apprendi*. What the Petitioner seeks to do is to mount an attack on the role that the grand jury plays in returning indictments in criminal proceedings and, therefore, is a direct assault on the Fifth Amendment itself.

The Petitioner wants this Court to consider treating indictment errors involving -- *the grand jury* -- under the plain-error analysis articulated in *United States v. Olano*, 507 U.S. 725 (1993). In support of this proposition, the Petitioner refers this Court to those cases that have discussed how appellate courts should review trial errors involving -- *the petit jury* - under plain error review. See *e.g.*, *Neder v. United States*, 527 U.S. 1 (1999)(faulty jury instruction); *Johnson v. United States*, 520 U.S. 461 (1997)(failure to submit an element of a crime to the petit jury).

The Petitioner fails to give the necessary adherence to those cases by this Court that have discussed how appellate court should review grand jury errors -- the error in this case. The reason that the Petitioner's silence is so deafening is that the Fourth Circuit provided a careful consideration of the relevant facts and the applicable law in resolving those cases where there is a grand jury error as opposed to an error which occurs during the trial process. The Fourth Circuit followed this Court's instruction that "[a]n indictment found by the grand jury is indispensable to the power of the court to try [the defendant] for the crime with which he as charged." *Ex Parte Bain*, 121 U.S. 1, 12-13 (1887). And that a "court cannot permit a defendant to be tried on charges that are not made in the indictment against him." *Stirone v. United States*, 361 U.S. 212, 217 (1960).

"[T]he Fifth Amendment to the United States Constitution requires that 'no person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury.'" Pet. App. A at 9a. The Petitioner wants this Court to sanction the ability of federal district and circuit courts to "impermissibly broaden the indictment on its own accord during the sentencing phase." Pet. App. A at 10a. And, by

judicial fiat, abrogate "the prerogative of the grand jury, because only the grand jury has the power to broaden the charges 'after an indictment has been returned.'" Pet. App. A at 11a.

The essence of the Respondents' opposition to the Petition can be summarized as follows:

> We cannot imagine that the Supreme Court would believe itself bound to notice the error when a conviction is based upon a crime with which a defendant was not charged on one hand [*United States v. Silber*, 370 U.S. 717 (1962)], but, on the other hand, decline to recognize the error under the equally (or possibly more) egregious circumstance where a defendant is sentenced based upon a crime that was not charged in the indictment nor even presented to the petit jury.

Pet. App. A at 13a.

The Fourth Circuit held that the Respondents were sentenced for an unindicted crime under *Apprendi*. This is not subject to debate or dispute (and, in fact, is now conceded by the Petitioner) since an indictment that does not include the specified threshold drug quantities necessary for conviction under the aggravating drug trafficking offenses set forth in 21 U.S.C.A. §841 is defective. As a result of this error of constitutional dimension, five of the Respondents received life imprisonment sentences and two Respondents received thirty-year imprisonment sentences - when the statutory maximum

for each of the Respondents was a term of imprisonment not to exceed twenty years. This type of error - attributable solely to the grand jury - is of the type that will "defy analysis by 'harmless error' standards." *Arizona v. Fulminante*, 499 U.S. 279, 309 (1991).

The Fourth Circuit was legally correct in concluding that that *Apprendi* indictment error was one that "stems from a defect in the indictment." Pet. App. A at 15a. Certainly a defective indictment which calls into question a court's jurisdiction to impose a sentence not charged in the indictment is equally as (if not more) troublesome as those limited types of cases where this Court has "found structural errors" to have occurred. *Johnson*, 520 U.S. at 468. As the error here resulted in the Respondents being sentenced as opposed to convicted for a crime for which they were not charged, the appropriate remedy is resentencing within the appropriate contours of the count of conviction. *United States v. Pridgeon*, 153 U.S. 48, 62 (1894). That is, a sentence not to exceed a term of imprisonment of twenty years.

The Fourth Circuit was also legally correct in its interpretation the *Apprendi* indictment error under the plain error analysis. *Olano*, 507 U.S. at 731-32. By finding that a sentence which exceeds the applicable

statutory maximum of twenty years does affect a defendant's substantial rights, there is plain error. It was an entirely appropriate exercise of the court's discretion to conclude that such a sentence "seriously affect[s] the fairness, integrity, or public reputation of judicial proceedings." Pet. App. A at 12a.

Under either theoretical approach - structural error or plain error review, the Respondents were sentenced "for a crime with which they were never charged, thus depriving them of the constitutional right to 'answer' only for those crimes presented to the grand jury. Pet. App. A at 11a.

CONCLUSION

For all of the foregoing reasons, the Respondents respectfully pray that this Honorable Court deny the Petition for Writ of Certiorari.

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December 7, 2001

Supreme Court, U S
F I L E D
DEC 1 8 2001
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No. 01-687

In the Supreme Court of the United States

UNITED STATES OF AMERICA, PETITIONER

v.

LEONARD COTTON, MARQUETTE HALL, LAMONT THOMAS, MATILDA HALL, JOVAN POWELL, JESUS HALL, AND STANLEY HALL, JR.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

REPLY BRIEF FOR THE PETITIONER

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

REPLY BRIEF FOR THE PETITIONER

Respondents acknowledge (Br. in Opp. 3) a circuit conflict on the question presented by the petition: whether the omission from a federal indictment of a fact that enhances the statutory maximum sentence requires a court of appeals automatically to vacate the enhanced sentence, even when the defendant did not object in the district court, the government introduced overwhelming evidence at trial supporting that fact, and the defendant had notice before trial that the fact could be used to seek an enhanced sentence. Respondents and their amici have offered no persuasive reason why the Court should not resolve that conflict in this case.

1. Respondents mistakenly assert (Br. in Opp. 3) that the circuit conflict involves only "a relatively limited universe of federal criminal cases that were pending in the district court or were on direct appellate review when the Court issued the decision in *Apprendi* v. *New Jersey*, 530 U.S. 466 (2000)." As explained in the petition (at 20-22), the question whether the omission of an essential allegation from an indictment invariably requires reversal is not limited to the context of pre-*Apprendi* federal drug prosecutions under 21 U.S.C. 841 and 846. Such omissions may occur for a variety of reasons, including an intervening clarification of the law by an appellate court or a mistake by a prosecutor in drafting an indictment.[1]

[1] See, *e.g.*, *United States* v. *Prentiss*, 256 F.3d 971 (10th Cir. 2001) (en banc) (per curiam) (indictment charging arson in Indian Country, in violation of 18 U.S.C. 81 and 1152, failed to allege Indian and non-Indian status of victim and defendant); *United States* v. *Pernillo-Fuentes*, 252 F.3d 1030 (9th Cir. 2001) (indictment charging attempted entry into the United States following deportation, in violation of 8 U.S.C. 1326, failed to allege specific intent element); *United States* v. *Du Bo*, 186 F.3d 1177 (9th Cir. 1999) (indictment charging interference with commerce by extortion, in violation of 18 U.S.C. 1951, failed to allege that defendant acted knowingly or willfully); *United States* v. *Spinner*, 180 F.3d 514 (3d Cir. 1999) (indictment charging access device fraud, in violation of 18 U.S.C. 1029(a)(5), failed to allege that transactions affected interstate commerce); *United States* v. *Cabrera-Teran*, 168 F.3d 141 (5th Cir. 1999) (indictment charging entry into the United States following deportation, in violation of 8 U.S.C. 1326, failed to allege that defendant previously had been arrested); *United States* v. *Daniels*, 973 F.2d 272 (4th Cir. 1992) (indictment charging unlawful transfer of firearm, in violation of 26 U.S.C. 5861(e), failed to allege that firearm was transferred in violation of Chapter 53 of title 26), cert. denied, 506 U.S. 1086 (1993); *United States* v. *Murphy*, 762 F.2d 1151 (1st Cir. 1985) (indictment charging use of threats to influence testimony of witness in a judicial proceeding, in violation of 18 U.S.C. 1512(a)(1), failed to identify the judicial proceeding in which the defendants sought to influence testimony).

In light of the continuing importance of the question presented, the conflict involving prosecutions under Sections 841 and 846 warrants review. Since the petition for certiorari was filed, the Second Circuit, sitting en banc, has adopted an approach similar to that of the Fourth Circuit here, reversing an enhanced sentence under Section 841 on plain-error review. *United States* v. *Thomas*, No. 98-1051, 2001 WL 1579993 (Dec. 12, 2001). At least three other circuits have taken a contrary approach, affirming sentences on plain-error review notwithstanding the omission from the indictment of a fact essential to the enhanced sentence. See Pet. 18-21 (citing cases). That conflict is ripe for resolution by this Court.

2. Respondents make the assertion (Br. in Opp. 4-5) that, contrary to the implication of the question presented in the petition, they did "object to the[ir] sentences in the district court" based on the quantity of drugs attributable to them. Respondents did not, however, make a legally or factually relevant objection. They raised an objection to their sentences under the Sentencing Guidelines. They did not raise any constitutional objection in the district court to the omission of drug quantity from the indictment (or to the court's failure to submit the question of drug quantity to the petit jury). The constitutional claim that they raised for the first time in the court of appeals was thus reviewable only for plain error.

Moreover, respondents did not dispute that their conspiracy offense involved at least 50 grams of cocaine base, the threshold amount that triggers a maximum

sentence of life imprisonment under 21 U.S.C. 841(b)(1)(A)(iii). In light of the evidence at trial, no question could have been raised that the offense involved that threshold amount of cocaine base. The evidence included some 380 grams of cocaine base that had been seized by law-enforcement officers during the arrests of the conspirators and the searches of their residences. See Pet. App. 28a (Wilkinson, C.J., dissenting) (noting that "none of [the respondents] disputed the amount of crack actually seized by the police officers and federal agents").

Instead, respondents merely disputed the determination in the Presentence Reports (PSRs) that their base offense level under the Sentencing Guidelines was 38, the level applicable to offenses involving 1.5 kilograms or more of cocaine base. See Guidelines § 2D1.1(c)(1). They argued that their base offense level should be reduced to 32, 34, or 36, but each of those levels entails responsibility for at least 50 grams of cocaine base. See Guidelines § 2D1.1(c)(2), (3) and (4).[2]

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[2] Lamont Thomas, for example, argued that his base offense level should be 34, pointing out that only "500 grams of actual cocaine base" was seized by law-enforcement officers. 2/26/99 Thomas Sent. Tr. 3-9; Addendum to Thomas PSR 1. Marquette Hall argued that his base offense level should be 36, because he was "responsible for less than 1.5 kilograms of cocaine base." Addendum to Marquette Hall PSR 2; 2/12/99 Marquette Hall Sent. Tr. 6-8. See also 2/12/99 Cotton Sent. Tr. 9-13, 15 (arguing that Cotton's base offense level should be 34 based on the "approximately 400 grams [of cocaine base] that was actually seized"); 3/5/99 Stanley Hall Sent. Tr. 8-12 (arguing that Stanley Hall's base offense level "more likely than not ought to be a 32"). Jesus Hall argued that a base offense level of 36 would be "a more appropriate guideline level." 2/26/99 Jesus Hall Sent. Tr. 4. During his sentencing allocution, Jesus Hall also argued that he was not a member of the conspiracy, and thus could be sentenced based only on the "ounce quantities of [powder] cocaine" that he actually distributed. *Id.* at 29-44. The premise of that argument had already been rejected by the jury, which found him guilty of the conspiracy offense notwithstanding his denials.

Of the two respondents who received 30-year sentences, see 21 U.S.C. 841(b)(1)(B)(iii), Matilda Hall merely argued that the amount of cocaine base attributable to her was "well below 1½ kilograms." 3/4/99 Matilda Hall Sent. Tr. 48-49. Jovan Powell "incorporate[d] the arguments" of the other defendants as to why the base offense level should be lower than 38, but acknowledged that "he ha[d] a few grams [of cocaine base] in his sweat pants" when he was arrested. 3/4/99 Powell Sent. Tr. 2, 27. In fact, the amount of cocaine base in his sweat pants exceeded 50 grams. See Pet. App. 28a (Wilkinson, C.J., dissenting).

It is irrelevant for present purposes that respondents disputed their responsibility for the full 1.5 kilograms of cocaine base attributed to them by the PSRs. Those disputes related only to the term of imprisonment that was warranted for each respondent under the Sentencing Guidelines. See *Witte* v. *United States*, 515 U.S. 389, 399-404 (1995) (recognizing that the Guidelines merely "channel the sentencing discretion of the district courts and * * * make mandatory the consideration of factors" that courts have always had discretion to consider in imposing a sentence "within the range authorized by statute"). Respondents did not contest the crucial fact that raised the *statutory* maximum to life imprisonment—*i.e.*, that the offense involved at least 50 grams of cocaine base. It was the omission of *that* fact from the indictment that gives rise to the claim on which respondents prevailed in the court of appeals.

Respondents' further contention that they were not on "notice that the government could seek an enhanced sentence" (Br. in Opp. 5) is unfounded. Like other defendants who were indicted before *Apprendi*, respondents could not reasonably have expected that their

sentences for the drug conspiracy offense would be limited to the lowest statutory maximum. As Chief Judge Wilkinson observed in dissent, it is "difficult to believe that [respondents] lacked notice that they faced [Section 841(b)'s] strictest penalties," especially since the original indictment in the case expressly charged them with participation in a conspiracy involving at least 50 grams of cocaine base and the government presented evidence that the conspiracy involved a quantity of cocaine base that supported "the elevated penalties available under" Section 841(b)(1)(A). Pet. App. 28a-29a.

3. Respondents devote the remainder of their brief to arguing that the court of appeals' decision is correct on the merits. That would not provide any basis for denying review of a question of such significance to the federal criminal justice system. Respondents cannot, and do not, dispute that the circuits are in irreconcilable conflict over the question presented in this case. See Pet. 18-21 (discussing conflict). That conflict will not be resolved without this Court's intervention.

Respondents contend (Br. in Opp. 8-9) that the omission of an element, or sentence-enhancing fact, from an indictment is a "structural" error—*i.e.*, an error that "*necessarily* render[s] a criminal trial fundamentally unfair or an unreliable vehicle for determining guilt or innocence." *Neder* v. *United States*, 527 U.S. 1, 9 (1999). But this Court has "found an error to be 'structural,' and thus subject to automatic reversal, only in a 'very limited class of cases.'" *Id.* at 8 (quoting *Johnson* v. *United States*, 520 U.S. 461, 468 (1997)). This is not one of them. If the failure to obtain a petit jury finding on an offense element may be excused as harmless, as this Court held in *Neder*, then the failure to obtain a grand jury determination on an offense element (or other essential fact) may also be excused as harmless. A court of appeals would engage in the same sort of analysis in both contexts, examining whether the evidence establishing the omitted element was overwhelming and whether the defendant contested the element while on notice of the need to do so. In neither context would the inquiry "defy analysis by 'harmless error standards.'" *Arizona* v. *Fulminante*, 499 U.S. 279, 309 (1991).

Alternatively, respondents contend (Br. in Opp. 9-10) that a sentence that exceeds the statutory maximum term that is applicable without reference to the fact omitted from the indictment always requires reversal under the plain-error standard because it "seriously affect[s] the fairness, integrity, or public reputation of judicial proceedings." *United States* v. *Olano*, 507 U.S. 725, 732 (1993) (citations omitted). But the Court held in *Johnson* that the failure to obtain a petit jury finding on an offense element does not necessarily require reversal on plain-error review. See 520 U.S. at 469-470. The same is true with respect to the failure to obtain a finding on an offense element from a grand jury, a body whose findings are always subject to examination by the trier of fact under a heightened standard of proof. See *United States* v. *Mechanik*, 475 U.S. 66, 70 (1986).

4. Amici National Association of Criminal Defense Lawyers et al. urge (Br. 4) that the Court defer resolution of the question presented in the petition until it resolves "a number of jurisprudentially antecedent" questions. The questions identified by amici are, however, analytically distinct from the question presented in the petition. Moreover, they have been resolved consistently and correctly by the courts of appeals since *Apprendi*.

Amici contend (Br. 5-10, 16-17 & n.17) that the Court should address whether the threshold drug quantities in Section 841(b)(1) may (or must), consistent with Congress's intent, be treated as offense elements that must be charged in the indictment and proved to the jury beyond a reasonable doubt; amici also suggest that, if Congress intended that drug quantity is a sentencing factor, the question arises whether Sections 841 and 846 are facially unconstitutional under *Apprendi*. No circuit conflict currently exists on the questions raised by amici. The courts of appeals have uniformly concluded that Section 841(b) may constitutionally be implemented in accordance with *Apprendi*. See *United States* v. *Kelly*, No. 00-2705, 2001 WL 1545672 at *2 & n.3 (3d Cir. Dec. 5, 2001) (upholding constitutionality of Section 841 and citing decisions of six other circuits); see also *Thomas*, 2001 WL 1579993, at *4 (describing *Apprendi*'s effect on Section 841 prosecutions).[3] The courts have concluded that nothing in the text, structure, or history of Section 841 precludes threshold drug quantities from being charged in an indictment and proved to a jury beyond a reasonable doubt, and that *Apprendi* requires that threshold drug quantities be treated in that manner when used to enhance the statutory maximum penalty. The courts of appeals have taken somewhat different routes to that conclu-

[3] Although a panel of the Ninth Circuit held in *United States* v. *Buckland*, 259 F.3d 1157 (2001), that Sections 841(b)(1)(A) and (B) are "facially unconstitutional" under *Apprendi* because they authorize an increase in the statutory maximum sentence based on drug-quantity determinations to be made by a court by a preponderance of the evidence, the Ninth Circuit granted rehearing en banc in that case and ordered that the panel opinion not be cited as precedent in the Ninth Circuit. 265 F.3d 1085 (2001).

sion.[4] But they have not reached substantively different results. There is no need for this Court to address those issues in order to resolve the issue presented in the petition.

In any event, the question presented in the petition is not limited to drug cases under Sections 841 and 846 (see Pet. 20-21; p. 2 & note 2, *supra*). The harmless-error and plain-error questions that divide the circuits merit this Court's review because of their wider ramifications.[5]

* * * * *

For the reasons stated above and in the petition for a writ of certiorari, the petition should be granted.

Respectfully submitted.

THEODORE B. OLSON
Solicitor General

DECEMBER 2001

[4] Compare *United States* v. *Sanchez*, 269 F.3d 1250, 1268 (11th Cir. 2001) (en banc) ("*Apprendi* does not affect our prior statutory construction of § 841(b) as setting forth purely sentencing factors"), with *United States* v. *Doggett*, 230 F.3d 160, 164 (5th Cir. 2000) (court was "constrained by *Apprendi*" to overrule prior decisions holding that "Congress did not intend drug quantity to be an element of the crime" under Section 841), cert. denied, 121 S. Ct. 1152 (2001). The Fifth Circuit has granted rehearing en banc in two cases in which it has asked for supplemental briefing on, among other things, whether it should reconsider *Doggett*'s holding that *Apprendi* "appl[ies] to offenses under 21 U.S.C. § 841." Memorandum to Counsel at 1, *United States* v. *Longoria*, No. 00-50405 (5th Cir. Aug. 30, 2001).

[5] Amici also raise various challenges to the merits of the plain-error/harmless-error analysis urged by the United States in the petition and adopted by the First, Seventh, and Eleventh Circuits. Such arguments, like the similar arguments of respondents, provide no reason to deny review in this case.

(4)

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On Petition for Writ of Certiorari
to the United States Court of Appeals
for the Fourth Circuit

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BRIEF OF AMICI CURIAE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AND FAMILIES AGAINST MANDATORY MINIMUMS FOUNDATION, IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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COUNTER-STATEMENT OF QUESTION PRESENTED

Does a federal district court lack jurisdiction under 18 U.S.C. § 3231 and the Grand Jury Clause of the Fifth Amendment, or otherwise lack authority, to sentence for a greater degree of offense than that charged in the indictment, so that a penalty in excess of the maximum allowed by law for the charged level of offense must be vacated on direct appeal, regardless of any failure of counsel to object to the sentence in the district court?

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BRIEF OF AMICI CURIAE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AND FAMILIES AGAINST MANDATORY MINIMUMS FOUNDATION, IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS (NACDL) and FAMILIES AGAINST MANDATORY MINIMUMS FOUNDATION (FAMM) submit this amicus brief pursuant to this Court's Rule 37.2(a) in support of respondents' opposition to the Solicitor General's petition for writ of certiorari to the United States Court of Appeals for the Fourth Circuit. Petitioner and the respondents have granted consent to file this brief, and letters of consent have been or will be filed with the Clerk of this Court.[1]

INTERESTS OF THE AMICI

Amici curiae are the nation's leading criminal defense bar association and a grass-roots criminal justice reform organization comprising family members and other supporters of prisoners serving mandatory minimum sentences. Both amici frequently have been granted leave to file amicus briefs in this Court, often jointly, and their counsel and leading members have argued many cases involving points of sentencing law in

[1] No counsel for any party to this case authored this brief in whole or in part, and no person or entity other than NACDL and FAMM made any monetary contribution to its preparation or submission.

this Court.[2]

ADDITIONAL STATUTE, RULES AND CONSTITUTIONAL PROVISION INVOLVED

The Sixth Amendment provides, in pertinent part: "In all criminal prosecutions, the accused shall enjoy the right ... to be informed of the nature and cause of the accusation; ...."

Title 18 of the United States Code provides, in pertinent part:

> The district courts of the United States shall have original jurisdiction, exclusive of the courts of the States, of all offenses against the laws of the United States.
>
> * * * *

The Federal Rules of Criminal Procedure provide, in pertinent part:

> **Rule 7. The Indictment and the Information**
>
> * * * *
>
> (c) **Nature and Contents**
>
> (1) **In General.** The indictment ... shall be a plain, concise and definite written statement of the essential facts constituting the offense charged. ...
>
> **Rule 12. Pleadings and Motions Before Trial; Defenses and Objections**
>
> * * * *
>
> (b) **Pretrial Motions.** Any defense, objection, or request which is capable of determination without the trial of the general issue may be raised before trial by motion. ... The following must be raised prior to trial:
>
> * * * *
>
> (2) Defenses and objections based on defects in the indictment or information (other than that it fails to show jurisdiction in the court or to charge an offense which objections shall be noticed by the court at any time during the pendency of the proceedings); ....
>
> * * * *

[2] The interests of the two amici are spelled out in more detail in the Addendum to this Brief.

AMICI'S BRIEF IN SUPPORT OF RESPONDENTS AND IN OPPOSITION TO CERTIORARI

Because the asserted split in the Circuits is not deeply ingrained, and because a logically necessary prior question of statutory construction went unexplored below and is not mentioned in the petition, this is not an appropriate case in which to grant certiorari on the constitutional question presented by the petition.

Respondents were convicted of a federal drug conspiracy and sentenced to life imprisonment, although the indictment described an offense which carries a penalty of no more than 20 years. The Fourth Circuit refused to countenance these illegal sentences. The government urges this Court to grant certiorari and adopt a rule of "plain error" under which the defendants' failure to object, coupled with supposedly overwhelming evidence, would authorize appellate affirmance of concededly invalid sentences (Pet. 11) of life without parole.

For several reasons in addition to those well articulated in the respondents' Brief in Opposition, this petition should be denied.

1. The asserted circuit conflict, although real, is of recent origin and is not deeply ingrained. Further developments in the circuits can be expected to illuminate the question presented, and its jurisprudential antecedents, in helpful ways.

The Solicitor General's petition for a writ of certiorari frames the issue in this case in terms of "[w]hether the omission from a federal indictment of a fact that enhances the statutory maximum sentence requires a court of appeals automatically to vacate the enhanced sentence ...." Pet. i. The issue, however, necessarily derives from a case arising under particular congressional enactments, Sections 401 and 406 of the Controlled Substances Act of 1970, as amended, *reprinted as* 21 U.S.C. §§ 841, 846.[3] The Solicitor General's formulation of the issue assumes resolution, favorable to the government, of a number of jurisprudentially antecedent, but unresolved, issues. The underlying issues are still "percolating" in the circuits, as is the issue of application of "plain error" review to convictions and sentences that are

[3] The statute conventionally known as 21 U.S.C. § 841 (1994 ed. & Supp. IV 1998) is properly referenced as the Controlled Substances Act of 1970, Pub. L. 91-513, Title II, § 401, Oct. 27, 1970, 84 Stat. 1260, as amended (the "CSA"). The distinction is pertinent to the argument. *See, e.g., United States v. Vazquez*, 271 F.3d 93, 111-12 (3d Cir. 2001) (en banc) (Becker, J., concurring) (captions "Unlawful acts" and "Penalties" do not appear in controlling statute but only in unofficial U.S. Code version). Except where essential, *Amici* employ the conventional reference.

unsupported by the indictment, because the indictment charges only a lesser grade of offense.

For instance, the petitioner, despite the government's previous arguments to the contrary, now attempts to concede that the reasoning of *Apprendi v. New Jersey*, 530 U.S. 466 (2000), "requires drug quantity to be charged in a federal indictment to support an increase in the statutory maximum sentence." Pet. 10 n.2. The petitioner acknowledges that the courts of appeals uniformly concluded before *Apprendi*, based on purported statutory construction vigorously advanced by the government, that threshold drug amounts were congressionally intended sentencing enhancement factors. Pet. 9. Yet the petition offers no argument and no support in this Court's cases for the government's current position that such supposedly intended sentencing enhancement factors may nevertheless be *treated*, by judicial fiat, as if they were elements for indictment and submission to the jury, even though Congress did not intend them to *be* elements. Rather, it merely cites the majority opinion in *United States v. Promise*, 255 F.3d 150, 156-57 (4th Cir. 2001) (en banc).[4]

[4] Notably, the government's petition does actually defend the construction of § 841 adopted by the court below, which is doctrinally unsupportable. Only Congress can define the elements of a federal offense. *Bousley v. United States*, 523 U.S. 614, 620-21 (1998); *Staples v. United States*, 511 U.S. 600, 604 (1994). A new constitutional decision by this Court in a state case cannot somehow convert what was not an element of a federal offense into an "element." Under well settled precedent addressing the limits of judicial review, if Congress intended drug type and amount to be sentencing factors, a court must honor that intent in subjecting § 841 to judicial review; it cannot contradict properly determined congressional intent, even if it would be expedient to do so. A court may certainly use avoidance of a constitutional problem as a tool of statutory

That case (like many cases of the last two years from various circuits) finds somewhere in *Apprendi* authority to contradict a (supposedly) definitively construed congressional enactment. *See Promise*, 255 F.3d at 156 ("Congress intended these specific threshold quantities to be sentencing factors rather than elements of the aggravated drug trafficking. ... *Apprendi* dictates that in order to authorize the imposition of a sentence exceeding the maximum allowable without a jury finding of a specific threshold drug quantity, the specific threshold drug quantity must be treated as an element of an aggravated drug trafficking offense"); *accord*, *Thomas*, slip op. at 10-12. Despite the government's attempted strategic concession, the question whether § 841, construed as containing congressionally defined sentencing enhancement factors, survives judicial review for constitutionality under *Apprendi* is unresolved in the lower courts, and is the subject of current *en banc* proceedings in the Ninth Circuit. *See United States v. Buckland*, 259 F.3d 1157 (9th Cir. 2001), *vacated for rehearing en banc*, 259 F.3d 1169 (9th Cir. 2001) (argued Sept. 26, 2001).

Moreover, logically prior to any application of the constitutional doctrine of *Apprendi* to § 841 is the question of statutory construction as to whether, without expressly saying so, Congress intended the threshold drug amounts in § 841(b)(1) to be sentencing enhancement

_____(footnote continued)

construction (*see, e.g.*, *United States v. Lopez*, 514 U.S. 549, 562 (1995); *Ashwander v. Tennessee Valley Authority*, 297 U.S. 288, 348 (1936) (Brandeis, J., concurring); *see also Jones v. United States*, 526 U.S. 227, 239-40 (1999)), but surely no court may rewrite a statute as a response to realizing that the law, construed as intended by the legislature, would otherwise be unconstitutional. *Miller v. French*, 530 U.S. 327, 339 (2000).

factors, rather than elements of graduated offenses of greater and lesser severity. *See, e.g.*, *Castillo v. United States*, 530 U.S. 120 (2000); *Jones v. United States*, 526 U.S. 227 (1999); *Almendarez-Torres v. United States*, 523 U.S. 224 (1998). While the *Almendarez-Torres* statutory inquiry has very rarely been conducted in § 841 cases, the results of that inquiry have been widely divergent. *Compare Promise*, 255 F.3d at 168-82 (Luttig, J., concurring, joined by Wilkinson, Niemeyer & Gregory, JJ.) (concluding that Congress intended facts in § 841(b) to be sentencing factors within the framework of a single offense, defined in § 841(a), that carries a maximum sentence of life imprisonment) *with United States v. Vazquez*, 271 F.3d 93, 107-15 (3d Cir. 2001) (en banc) (Becker, Ch.J., concurring, joined by Ambro, J.) (demonstrating, on thorough review of statutory language, structure, and history, that Congress intended drug type and amount to be offense elements of greater and lesser offenses defined not in § 841(a) itself but in § 841(b), which incorporates subsection (a)). It is this Court's practice, in general, to determine not merely whether there was "error," but also precisely what the error was, before applying the "plain error" rule. See *Johnson v. United States*, 520 U.S. 461, 467 (1997).

The presence beneath the question presented in this petition of these unresolved, yet fundamental, questions "of inestimable importance" regarding the interaction between *Apprendi* and § 841 (*Promise*, 255 F.3d at 169 (Luttig, J.)), makes it all the more relevant that this very issue, *i.e.*, the application of "plain error" review to § 841(b) convictions or sentences that are unsupported by the indictment, is pending before another circuit sitting *en banc*, *United States v. Longoria*, Nos. 00-50405 *et al.*

(5th Cir., argument tentatively scheduled for week of January 21, 2002), and was applied by yet another, sitting *en banc*, on the very day this amicus brief is being edited. See *United States v. Thomas*, Nos. 98-1051 *et al.* (2d Cir., filed Dec. 12, 2001). In both cases, the necessarily prior questions of whether Congress created drug type and amount as offense elements and whether, if not, the statute survives judicial review for constitutionality under *Apprendi* was fully briefed.[5]

The government's petition assumes that a conviction and sentence, predicated on a facially valid indictment for a lesser offense and brought under a statute that may violate *Apprendi* as to various related, more severely punished levels of offense, should be analyzed as "the omission from the indictment of an essential element (or sentence-enhancing fact)." Pet. 15. First, this case does *not* involve an indictment which fails to charge all the elements of a federal offense, as discussed in *Hamling v. United States*, 418 U.S. 87, 117 (1974); *Hagner v. United States*, 285 U.S. 427, 433 (1932); or *Ex parte Bain*, 121 U.S. 1 (1887). What the indictment here lacks, if

[5] In the *Longoria* proceeding, the Fifth Circuit has questioned the continuing validity of its decision in *United States v. Doggett*, 230 F.3d 160, 164-65 (5th Cir. 2000), *cert. denied*, 121 S.Ct. 1152 (2001). Along the lines of the *Promise* majority, *Doggett* reasserted that Congress in § 841(b) intentionally created sentencing enhancement factors, not elements, but held that *Apprendi* required the panel to "find in the opposite" of that (supposed) congressional intent. That is the same position just adopted by a unanimous Second Circuit in *Thomas*. Yet is difficult to understand, jurisprudentially, how *Apprendi* could "require" any such thing. A new constitutional decision by this Court in a state case does not somehow convert what was not an element of a federal offense -- a pure question of statutory construction and Congressional intent -- into an "element."

anything, is the averment of a fact necessary to charge the more serious grade of offense for which the government seeks to inflict punishment. Thus, the "error" claimed by the respondents-defendants in their appeal, from which the government's petition arises, lies not in the indictment but in the sentence. The assumption underlying the government's petition is unwarranted (*i.e.*, that it makes no difference whether the indictment, as framed, does or does not fully state an offense, even if not one as serious as the prosecutor wishes were charged). Proper resolution of the unresolved issues which are logically and jurisprudentially prior to a "plain error" analysis -- the most important being the precise nature of the "error" (is it in the indictment, or in the sentence?) -- will make a dramatic difference in properly assessing the consequences of that error.

If, as *amici* suggest, this Court voided the New Jersey statute under review in *Apprendi* because the Constitution denies to legislatures any power to assign judges the authority to determine additional, maximum-extending operative facts after the jury renders its verdict, *see Apprendi*, 530 U.S. at 490, and if 21 U.S.C. § 841 is such a statute (as all the circuits had held[6]), then the absence of constitutional authority for the statute precludes its application to impose, or affirm, any sentence. *See United States v. Chambers*, 291 U.S. 217, 222-23, 226 (1934).[7]

[6] *See* note 17 *post*.

[7] The unanimous opinion by the Chief Justice in *Chambers* held that pending prosecutions under the National Prohibition Act automatically abated as soon as the only constitutional authority for that Act, the 18th Amendment, was repealed by adoption of the 21st Amendment.

In contrast, if Congress intended drug type and amount to be § 841 offense elements, then thousands have been sentenced for congressionally defined aggravated offenses for which they were not indicted or convicted, and their illegal sentences are retroactively subject to correction on collateral attack. *Tinder v. United States*, 345 U.S. 565 (1953).[8] If, as the Solicitor General has unsuccessfully urged in recent *en banc* proceedings in various circuits, Congress in § 841 created some novel sort of operative fact, intentionally failing to designate it as either an element or a sentencing factor, see *United States v. Brough*, 243 F.3d 1078 (7th Cir. 2001), then an entirely new analysis of the import of such "facts" under the Fifth Amendment "grand jury clause" and Sixth Amendment "notice" and jury trial clauses will be needed.[9]

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[8] Under the elements interpretation, sentences for aggravated offenses would be invalid as to their mandatory minima, as well as their maxima. *See, e.g.*, 21 U.S.C. § 841(b)(1)(A). Having made this bed by aggressively pursuing a convenient reinterpretation of § 841 following *McMillan v. Pennsylvania*, 477 U.S. 79 (1986), the government now, perhaps understandably, hesitates to lie in it.

[9] The never-before-suggested interpretation of § 841 posited in *Brough* is of dubious validity, at best. *See Miller v. French*, 530 U.S. 327, 339 (2000) (federal court "cannot press statutory construction 'to the point of disingenuous evasion' even to avoid a constitutional question," quoting *United States v. Locke*, 471 U.S. 84, 96 (1985) (in turn quoting *Moore Ice Cream Co. v. Rose*, 289 U.S. 373, 379 (1933) (Cardozo, J.)); *Hill v. Wallace*, 259 U.S. 44, 71 (1922) (Taft, Ch.J.) (severability analysis "does not give the court power to amend the act"). Judicial review is limited to upholding or striking down the provision enacted by Congress. *See United States v. Jackson*, 390 U.S. 570, 572-82 (1968) (death penalty provision applicable only to those exercising right to jury trial voided; rejecting Government's proposed extra-statutory procedural overlays).

The unresolved issues are profound and surely deserving in their own right of full treatment by the lower courts -- and eventually, in the right case, by this Court -- instead of resolution by tacit assumption and strategic concession on the part of the government. For this Court to grant the government's petition at this time will not help resolve any of those issues, but rather will only stop a healthy development of judicial understanding of the seemingly narrow, but ill-framed, question presented, presently underway in the circuits. A grant in this case would also risk terminating inquiry into the underlying issues that the government's petition avoids by unwarranted assumption. Moreover, it may have the effect of thrusting all the unresolved issues upon this Court in the form of alternative grounds (or necessarily included questions) for affirming the judgment below, with the likely result that the question purportedly presented will not be reached by the Court. For these reasons, the Court should deny the petition in order to allow further development of the issues. Meanwhile, the judgment below should stand.

2. The petition wrongly assumes that "plain error" is the applicable standard, where the respondents' illegal-sentence argument was presented to the first court with authority to rule on it in their favor, and any failure to raise it in the district court made no difference.

The government's petition should also be denied because it assumes, rather than presents, an important but undecided question about the scope of the "plain error" rule, Fed.R.Crim.P. 52(b). The petitioner asserts that "all claimed errors in federal criminal trials, regardless of their nature or seriousness, are subject to the

plain-error rules set out in Rule 52(b) ...." Pet. 12. As a necessary predicate to its artfully framed Question Presented,[10] the petition further asserts that Rule 52(b) applies to the illegal sentences imposed in this case, Pet. 12-14, even though that error did not occur "in [a] federal criminal *trial*" but rather at sentencing, and even though an objection at that time to the now-conceded illegality would have been utterly futile and entirely bootless.[11]

Under the scheme of offenses Congress created, plain-error or harmless-error review cannot save the respondents' sentences, notwithstanding this Court's decisions in *Johnson v. United States*, 520 U.S. 461 (1997), and *Neder v. United States*, 527 U.S. 1 (1999), on which the government principally relies. First, *Neder* looked strictly at the "accuracy" of an incomplete verdict; its rationale is inconsistent with the Constitution if the Constitution provides a "political" allocation of criminal decision-making authority between the State (judges) and the citizenry (juries). *Compare id.* at 15 *and id.* at 30-32 (Scalia, J., dissenting). In *Apprendi*, the Court established that the Constitution indeed provides such a "political" allocation; the rationale of the *Apprendi* majority is identical in basis to Justice Scalia's dissent in *Neder*. *Apprendi*, 530 U.S. at 478, 479 n.6; *see also id.* at 498-99

[10] Your Amici have attempted to counter-state the Question Presented (page i *ante*) in a non-argumentative manner which does not prejudge or assume the answer to any of the subsidiary issues. If certiorari is granted in this case, the Court should make clear that it wants the critical underlying issues addressed, not assumed.

[11] Respondents claim that their objections to the PSI's assertions of drug quantity constituted a sufficient raising of the issue to avoid plain error review. Br. in Opp. 4-5. *Amici* take no position on that case-specific point.

(Scalia, J., concurring). Following *Apprendi*, this Court can be expected to overrule *Neder*, and the Court should therefore not take up a case, such as the present one, which calls for a novel application of it to a significantly different context.

Fealty to Congress' scheme of offenses in § 841 demonstrates that any application of *Neder* to this case would be an unwarranted extension of this undermined precedent. The fact omitted from the superseding indictment would not complete the congressionally defined offense of which the respondents were convicted, but rather would convert the offense of conviction into a greater-inclusive congressionally defined offense. Moreover, in this case, application of *Neder* would not just change the offense of conviction; it would also require that the indictment be amended to include the greater offense, which is impossible. *Stirone v. United States*, 361 U.S. 212, 219 (1960). Because *Neder* is dubious in provenance and prognosis, this Court should not extend it, particularly in a case implicating *Apprendi*.

In *Reed v. Ross*, 468 U.S. 1 (1984), considering whether a procedural default should be excused in a habeas corpus proceeding, this Court suggested criteria for judging whether the novelty of an issue makes it "not reasonably available to counsel." *Id.* at 17. In that case, the Court found the available support sufficiently sparse to excuse an absence of objection, even though at the time of Ross's appeal, "one Federal Court of Appeals had held that it was unconstitutional to require a defendant to disprove an essential element of a crime for which he is charged." *Id.* at 18. By contrast, at the time of sentencing in this case, a solid body of entrenched precedent, including but not limited to binding authority

in the governing Circuit,[12] held that statutory maximums could be increased as a result of findings made by the court at the time of sentencing by a mere preponderance standard. *See Monge v. California*, 524 U.S. 721 (1998); *Almendarez-Torres v. United States*, 523 U.S. 224 (1998); *United States v. Powell*, 886 F.2d 81, 84-85 (4th Cir. 1989).

Had an objection on constitutional grounds been lodged at sentencing, it not only would have necessarily been overruled, but there would also have been nothing the prosecutor or the court could have done to insulate themselves against the possibility of a change in the law, as in fact occurred in *Apprendi*. The purposes of the "plain error" rule would therefore not be served in the slightest by applying it in the present circumstances. Yet the government's petition assumes the rule applies even when it serves no purpose -- and that it applies to illegal sentences[13] -- without defending that proposition. For this reason as well, the petition should not be granted.

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[12] *See* note 17 *post*. This is therefore not a case where the argument was simply "unacceptable to that particular court at that particular time." *Engle v. Isaac*, 456 U.S. 107, 130 n.35 (1982); *see also Bousley v. United States*, 523 U.S. 614, 622-23 (1998) (rejecting contention that *Bailey* argument under 18 U.S.C. § 924(c) was "not reasonably available to counsel").

[13] *But see Heflin v. United States*, 358 U.S. 415 (1959) (illegal consecutive sentence for offense inapplicable to petitioner in light of convictions on other counts, vacated by unanimous Court on post-conviction attack, without mention of effect of lack of prior objection or appeal). Because the government's petition merely assumes that a "plain error" analysis as developed in cases discussing trial error can be applied *ipso facto* to sentencing issues, that important question also is not ripe for consideration in this case. *See also Thomas*, slip op. at 20-21 (declining to decide precise nature of *Apprendi* violation creates trial error as well as sentencing error).

3. The Petition attempts to frame the question so as to obscure the essential point that no fact necessary to the indictment's validity was omitted in this case; the indictment properly charges a felony carrying a 20-year sentence, but not one allowing a life term.

Certiorari is also not appropriate in this case because the petitioner, in its framing of the Question Presented, seeks to have this Court rule on the broader question of the effect of an unobjected-to omission from an indictment of an essential element of the offense. Pet. 20-22. Yet at the same time the petitioner refuses to address the question whether the threshold quantities set forth in the various subsections of 21 U.S.C. § 841(b) are such an element in a drug conspiracy case under *id.* § 846.

The superseding indictment against respondents omitted no element of the charged offense. It properly and fully averred every element of a conspiracy under 21 U.S.C. § 846 to violate *id.* § 841, without specifying what particular quantity of a controlled substance was to be distributed as the object of the conspiracy. The government recognizes that the maximum penalty for such a conspiracy is 20 years' imprisonment, with no mandatory minimum sentence.[14] This Court has long recognized that a sentence in a federal case for a more serious degree of offense than is supported by the words of the indictment is illegal and must be corrected, even if first raised on collateral attack. *Tinder v. United States*, 345 U.S. 565 (1953)(statute making postal theft a misde-

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[14] It is settled that the offense which was the object of a conspiracy must be set forth. *Joplin Merchandise Co. v. United States*, 236 U.S. 531, 535 (1915).

meanor unless value of mail stolen exceeded $100 made value an element of the felony; therefore, indictment charging theft of mail without specifying value charged only misdemeanor, requiring correction of sentence on review under 28 U.S.C. § 2255, notwithstanding absence of objection at trial or on appeal).[15] *A fortiori*, where, as here, an illegal sentence is raised as a claim on direct appeal, that error must at least be deemed plain -- even assuming Rule 52(b) applies -- and must in any event be corrected, to avoid a miscarriage of justice and to maintain the integrity and public reputation of the courts.[16]

Without any need to rely upon the doctrine of constitutional doubt and irrespective of the rule in *Apprendi v. New Jersey*, 530 U.S. 466 (2000), it can in fact be seen that Congress intended drug types and amounts in 21 U.S.C. § 841 to be offense elements always, for all purposes. *United States v. Vazquez*, 271 F.3d 93, 107-15 (3d Cir. 2001) (en banc) (Becker, Ch.J., concurring, joined by Ambro, J.). The decisions of all circuits to the contrary are erroneous and should, in the proper case, be overruled by this Court.[17]

Having ascertained by reference to this congressional intent what offense is alleged in the indictment, this Court would face the inescapable conclusion that the sentences imposed on the respondents exceed any validly authorized, congressionally defined maximum for the charged offense. Such excessive sentences are simply illegal; they cannot be saved, under the guise of plain- or harmless-error review, by what amounts to an appellate court-directed verdict for a greater-inclusive offense.

The district court also lacked any statutory jurisdictional basis to punish unalleged congressionally defined

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[15] In the *Tinder* opinion, this Court did not even mention whether the proof of value was disputed, or was "overwhelming," nor whether the defendant was surprised or lacked actual notice. Upon ascertaining that proof of value was an element distinguishing the felony from the misdemeanor, the Court simply remanded the case, noting that the sentence was illegal, in that it exceeded the statutory maximum for a misdemeanor, and therefore must be corrected.

[16] *Compare Silber v. United States*, 370 U.S. 717 (1962) (per curiam) (failure of indictment to allege essential facts, necessary to determine whether averment of element was legally supportable, required reversal as "plain error," without having been raised on appeal or in briefing to Supreme Court), applying *Russell v. United States*, 369 U.S. 749 (1962), *with Hagner v. United States*, 285 U.S. 427, 433 (1932) (harmless error doctrine does not "dispense with the rule which requires that the essential elements of an offense must be alleged; but ... it is enough that the necessary facts appear in any form, or by fair construction can be found within the terms of the indictment").

[17] Every Circuit has definitively construed drug amount (and often drug type as well) to be sentencing enhancement factors to be determined by the judge, post-verdict, by a preponderance of the evidence. See *United States v. Barnes*, 890 F.2d 545, 551 n.6 (1st Cir. 1989); *United States v. Campuzano*, 905 F.2d 677, 678-79 & n.1 (2d Cir. 1990); *United States v. Lewis*, 113 F.3d 487 (3d Cir. 1997); *United States v. Powell*, 886 F.2d 81, 84-85 (4th Cir. 1989); *United States v. Morgan*, 835 F.2d 79, 81 (5th Cir. 1987); *United States v. Moreno*, 899 F.2d 465, 472-74 (6th Cir. 1990); *United States v. Acevedo*, 891 F.2d 607, 611 (7th Cir. 1989); *United States v. Wood*, 834 F.2d 1382, 1388-90 (8th Cir. 1987); *United States v. Sotelo-Rivera*, 931 F.2d 1317, 1319 (9th Cir. 1991); *United States v. McCann*, 940 F.2d 1352, 1354, 1358 (10th Cir. 1991); *United States v. Smith*, 840 F.2d 886, 888 (11th Cir. 1988); *United States v. Patrick*, 959 F.2d 991, 995 n.5 (D.C. Cir. 1992). If the Court does not overrule those cases, the only proper course will be to declare § 841 unconstitutional on its face under *Apprendi*. *See United States v. Buckland*, 259 F.3d 1157 (9th Cir. 2001), *vacated for rehearing en banc*, 259 F.3d 1169 (9th Cir. 2001).

offenses. The statute conferring jurisdiction in criminal cases provides in pertinent part: "The district courts of the United States shall have original jurisdiction ... of all offenses against the laws of the United States." 18 U.S.C. § 3231. This statute does not provide a roving grant of authority to punish all federal crimes district courts may encounter.[18] Rather, the statute confers jurisdiction on district courts "to render judgment on the indictment." *United States v. Williams*, 341 U.S. 58, 66 (1951). The Solicitor General's attempt to quarrel with the Fourth Circuit's characterization of the alleged defect -- omission of a fact necessary to raise the grade of offense -- as "jurisdictional" (Pet. 14-18) is purely semantic.

This indictment did not *omit* any element necessary to charge an offense. Rather, the prosecutor who drafted the indictment intentionally (if erroneously) omitted any averment of a fact which the Solicitor General now concedes (Pet. 10 n.2) is necessary to charge the higher grade of drug offense. In Judge Aldisert's unforgettable phrase, describing exactly the government's argument in this case, the appellate courts should not act as a "circus hand following the prosecutorial elephant around the sawdust trail." *United States v. Gibbs*, 813 F.2d 596, 603 (3d Cir. 1987) (dissenting op.). Respondents were indicted for conspiring to distribute cocaine base in an unspecified quantity, a 20-year offense, but sentenced for conspiring to distribute more than 50 grams of "crack." Such sentences fall outside the jurisdiction of the district court to impose and of any appellate court to affirm.

In any event, the error detected by the court below was "jurisdictional" in just the sense discussed in older

[18] Were it so, a defendant would be placed in jeopardy for all federal crimes when tried for any federal crime.

habeas cases of this Court. *See Haas v. Henkel*, 216 U.S. 462, 476-81 (1910); *Hyde v. Shine*, 199 U.S. 62, 78-83 (1905); *Ex parte Yarbrough*, 110 U.S. 651 (1884) (giving full consideration, on habeas, to question whether indictment charged an offense).

The jurisdiction of the district court (and hence of the court of appeals or of this Court[19]) is statutorily limited to the offense charged. Thus, under any standard of review, the court below had no choice but to reverse a sentence for the uncharged, greater-inclusive offense of a conspiracy to possess more than five kilograms of cocaine. *Gibbs*, 813 F.2d at 603-10 (Aldisert, J., dissenting); *see also Sanchez*, 2001 WL 1242087, *41-*49 (Barkett, J., concurring); *Vazquez*, 271 F.3d at 116-22 (Sloviter, Mansmann, Nygaard & McKee, JJ., dissenting); *id.* at 126-30 (Rendell & Roth, JJ., dissenting); *Promise*, 255 F.3d at 186-95 (Motz, Widener, Michael & King, JJ., dissenting).

For this further reason, as well as those discussed in the respondents' brief in opposition, the petition for writ of certiorari should be denied.

[19] *See Bender v. Williamsport Area School Dist.*, 475 U.S. 534, 541 (1986), quoting *United States v. Corrick*, 298 U.S. 435, 440 (1936).

CONCLUSION

For the foregoing reasons, and for the reasons given by the respondents, this is not the case in which this Court should address the developing split in the Circuits on the "jurisdiction" of a federal court to sentence for a more serious degree of the offense charged than that set out in the indictment, or the applicability of the "plain error" rule in such cases. The government's petition should be denied.

Respectfully submitted,

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Dated: December 12, 2001

ADDENDUM

NACDL is a District of Columbia nonprofit corporation with more than 10,000 attorney-members nationwide and 80 state and local affiliate organizations with 28,000 members in all 50 states, including private criminal defense lawyers, public defenders and law professors. The American Bar Association recognizes NACDL as an affiliate organization and awards it full representation in its House of Delegates. NACDL was founded in 1958 to promote study and research in the field of criminal law, to disseminate and advance knowledge of the law in the area of criminal practice, and to encourage the integrity, independence, and expertise of defense lawyers in criminal cases. NACDL defends the individual liberties guaranteed by the Bill of Rights and has a keen interest in ensuring that legal proceedings are handled properly and justly. To promote the proper administration of justice and appropriate measures to safeguard the rights of all person involved in the criminal justice system, NACDL files at least ten *amicus* briefs in this Court each Term on a variety of criminal justice issues.

FAMM is a nonprofit, nonpartisan organization with 24,000 members and 35 Chapters nationwide. FAMM conducts research, promotes advocacy and educates the public regarding the excessive cost of mandatory minimum sentencing. The cost is not limited to public expenditures but includes the perpetuation of unwarranted sentencing disparities, disproportionate sentences, and the transfer of the sentencing function from the judiciary to the prosecution. FAMM does not argue that crime should go unpunished, but rather that the punishment should fit the crime and the culpability of

the offender. FAMM therefore has a special interest in ensuring that sentencing law and practice result in just outcomes, and to the extent that mandatory sentences are required by law, that they be arrived at consistently with statutory and constitutional mandates.

Supreme Court, U.S.
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FEB 19 2002
CLERK

(9)

No. 01-687

In the Supreme Court of the United States

UNITED STATES OF AMERICA, PETITIONER

v.

LEONARD COTTON, MARQUETTE HALL, LAMONT THOMAS, MATILDA HALL, JOVAN POWELL, JESUS HALL, AND STANLEY HALL, JR.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

JOINT APPENDIX

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UNITED STATES DISTRICT COURT FOR THE
DISTRICT OF MARYLAND

No. 97-CR-365-ALL

UNITED STATES OF AMERICA, PLAINTIFF

v.

HALL, ET AL., DEFENDANTS

RELEVANT DOCKET ENTRIES

DATE	DOCKET NUMBER	PROCEEDINGS
10/3/97	1	INDICTMENT as to Stanley Hall (1) count(s) 1, Lamont Thomas (2) count(s) 1, Marquette Hall (3) count(s) 1, Jesus Hall (4) count(s) 1, Leonard Cotton (5) count(s) 1, Matilda Hall (6) count(s) 1, Jovan Powell (7) count(s) 1, Allen Murdock (8) count(s) 1, Carla Malloy (9) count(s) 1 (amf) [Entry date 10/03/97]
10/17/97	—	ARREST of Stanley Hall (amf) [Entry date 10/27/97]
10/17/97	—	ARREST of Lamont Thomas (amf) [Entry date 10/27/97]
10/17/97	—	ARREST of Matilda Hall (amf) [Entry date 10/27/97]

DATE	DOCKET NUMBER	PROCEEDINGS
10/17/97	—	ARREST of Jovan Powell (amf) [Entry date 10/27/97]
10/17/97	—	ARREST of Carla Malloy (amf) [Entry date 10/27/97]
10/20/97	—	Initial appearance as to Stanley Hall held on 10/17/97 before Magistrate Judge Paul M. Rosenberg (Court Reporter/ER: Tape) (Defendant informed of rights.) (amf) [Entry date 10/21/97]
10/20/97	—	Initial appearance as to Lamont Thomas held on 10/17/97 before Magistrate Judge Paul M. Rosenberg (Court Reporter/ER: Tape) (Defendant informed of rights.) (amf) [Entry date 10/21/97]
10/20/97	—	Initial appearance as to Matilda Hall held on 10/17/97 before Magistrate Judge Paul M. Rosenberg (Court Reporter/ER: Tape) (Defendant informed of rights.) (amf) [Entry date 10/21/97]

DATE	DOCKET NUMBER	PROCEEDINGS
10/20/97	—	Initial appearance as to Jovan Powell held on 10/17/97 before Magistrate Judge Paul M. Rosenberg (Court Reporter/ER: Tape) (Defendant informed of rights.) (amf) [Entry date 10/21/97]
10/20/97	—	Initial appearance as to Carla Malloy on 10/17/97 held before Magistrate Judge Paul M. Rosenberg (Court Reporter/ER: Tape) (Defendant informed of rights.) (amf) [Entry date 10/21/97]
10/20/97	—	Initial appearance as to Marquette Hall held before Magistrate Judge Paul W. Grimm (Court Reporter/ER: Roberts) (Defendant informed of rights.) (amf) [Entry date 10/21/97]
10/20/97	—	Initial appearance as to Jesus Hall held before Magistrate Judge Paul W. Grimm (Court Reporter/ER: Roberts) (Defendant informed of rights.) (amf) [Entry date 10/21/97]

DATE	DOCKET NUMBER	PROCEEDINGS
10/20/97	—	Initial appearance as to Allen Murdock held before Magistrate Judge Paul W. Grimm (Court Reporter/ER: Tape) (Defendant informed of rights.) (amf) [Entry date 10/21/97]
10/20/97	—	ARREST of Marquette Hall (amf) [Entry date 10/27/97]
10/20/97	—	ARREST of Jesus Hall (amf) [Entry date 10/27/97]
10/20/97	—	ARREST of Allen Murdock (amf) [Entry date 10/27/97]
11/3/97	—	Pleading of the count(s), Arraignment as to Jesus Hall, Not Guilty: Jesus Hall (4) count(s) 1 held on 10/29/97 before Magistrate Judge Paul M. Rosenberg (Court Reporter/ER: Tape) (amf) [Entry date 11/04/97]
11/3/97	—	Pleading of the count(s), Arraignment as to Matilda Hall, Not Guilty: Matilda Hall (6) count(s) 1 held on 10/29/97 before Magistrate Judge Paul M. Rosenberg (Court Reporter/ER: Tape) (amf) [Entry date 11/04/97]

DATE	DOCKET NUMBER	PROCEEDINGS
11/3/97	—	Pleading of the count(s), Arraignment as to Allen Murdock, Not Guilty: Allen Murdock (8) count(s) 1 held on 10/29/97 before Magistrate Judge Paul M. Rosenberg (Court Reporter/ER: Tape) (amf) [Entry date 11/04/97]
11/3/97	—	Pleading of the count(s), Arraignment as to Carla Malloy, Not Guilty: Carla Malloy (9) count(s) 1 held on 10/29/97 before Magistrate Judge Paul M. Rosenberg (Court Reporter/ER: Tape) (amf) [Entry date 11/04/97]
11/3/97	—	Pleading of the count(s), Arraignment as to Lamont Thomas, Not Guilty: Lamont Thomas (2) count(s) 1 held on 10/31/97 before Magistrate Judge Paul M. Rosenberg (Court Reporter/ER: Tape) (amf) [Entry date 11/04/97]

DATE	DOCKET NUMBER	PROCEEDINGS
11/3/97	—	Pleading of the count(s), Arraignment as to Marquette Hall, Not Guilty: Marquette Hall (3) count(s) 1 held on 10/31/97 before Magistrate Judge Paul M. Rosenberg (Court Reporter/ER: Tape) (amf) [Entry date 11/04/97]
11/3/97	—	Pleading of the count(s), Arraignment as to Jovan Powell, Not Guilty: Jovan Powell (7) count(s) 1 held before Magistrate Judge Paul M. Rosenberg (Court Rporter/ER: Tape) (amf) [Entry date 11/04/97]
11/4/97	—	ARREST of Leonard Cotton (amf) [Entry date 11/18/97]
11/18/97	—	Initial appearance as to Leonard Cotton held on 11/5/97 before Magistrate Judge Paul M. Rosenberg (Court Reporter/ER: Tape) (Defendant informed of rights.) (amf) [Entry date 11/18/97]

DATE	DOCKET NUMBER	PROCEEDINGS
11/19/97	—	Pleading of the count(s), Arraignment as to Stanley Hall, Not Guilty: Stanley Hall (1) count(s) 1 held on 11/14/97 before Magistrate Judge Paul M. Rosenberg (Court Reporter/ER: Tape) (amf) [Entry date 11/20/97]
11/20/97	—	Pleading of the count(s), Arraignment as to Leonard Cotton, Not Guilty: Leonard Cotton (5) count(s) 1 held before Magistrate Judge Susan K. Gauvey (Court Reporter/ER: Smith) (amf)
3/19/98	114	SUPERSEDING INDICTMENT as to Stanley Hall (1) count(s) 1s, Lamont Thomas (2) count(s) 1s, Marquette Hall (3) count(s) 1s, Jesus Hall (4) count(s) 1s, Leonard Cotton (5) count(s) 1s, Matilda Hall (6) count(s) 1s, Jovan Powell (7) count(s) 1s, Allen Murdock (8) count(s) 1s, Carla Malloy (9) count(s) 1s, James D. Gibson (10) count(s) 1s, Darlene Green (11) count(s) 1s, Nicole Baylor (12) count(s) 1s, Stanley Hall (13) count(s) 1s, Roger Evans (14) count(s) 1s (amf) [Entry date 03/23/98]

DATE	DOCKET NUMBER	PROCEEDINGS
3/23/98	—	ARREST of Darlene Green (amf) [Entry date 03/25/98]
3/25/98	—	Initial appearance as to Darlene Green held on 3/23/98 before Magistrate Judge Susan K. Gauvey (Court Reporter/ER: (Defendant informed of rights.) (amf) [Entry date 03/25/98]
3/26/98	—	ARREST of Roger Evans (amf) [Entry date 03/27/98]
3/26/98	—	Initial appearance as to Roger Evans held before Magistrate Judge Susan K. Gauvey (Court Reporter/ER: Smith) (Defendant informed of rights.) (amf) [Entry date 03/27/98]
4/10/98	—	Pleading of the count(s), Arraignment as to Stanley Hall, Not Guilty: Stanley Hall (1) count(s) 1s held before Magistrate Judge Paul W. Grimm (Court Reporter/ER: Roberts) (amf) [Entry date 04/10/98]

DATE	DOCKET NUMBER	PROCEEDINGS
4/10/98	—	Pleading of the count(s), Arraignment as to Lamont Thomas, Not Guilty: Lamont Thomas (2) count(s) 1s held before Magistrate Judge Paul W. Grimm (Court Reporter/ ER: Roberts) (amf) [Entry date 04/10/98]
4/10/98	—	Pleading of the count(s), Arraignment as to Leonard Cotton, Not Guilty: Leonard Cotton (5) count(s) 1s held before Magistrate Judge Paul W. Grimm (Court Reporter/ ER: Roberts) (amf) [Entry date 04/10/98]
4/10/98	—	Pleading of the count(s), Arraignment as to Matilda Hall, Not Guilty: Matilda Hall (6) count(s) 1s held before Magistrate Judge Paul W. Grimm (Court Reporter/ E R: Roberts) (amf) [Entry date 04/10/98]

DATE	DOCKET NUMBER	PROCEEDINGS
4/10/98	—	Pleading of the count(s), Arraignment as to Jovan Powell, Not Guilty: Jovan Powell (7) count(s) 1s held before Magistrate Judge Paul W. Grimm (Court Reporter/ ER: Roberts) (amf) [Entry date 04/10/98]
4/10/98	—	Pleading of the count(s), Arraignment as to Carla Malloy, Not Guilty: Carla Malloy (9) count(s) 1s held before Magistrate Judge Paul W. Grimm (Court Reporter/ER: Roberts) (amf) [Entry date 04/10/98]
4/10/98	—	Pleading of the count(s), Arraignment as to James D. Gibson, Not Guilty: James D. Gibson (10) count(s) 1s held before Magistrate Judge Paul W. Grimm (Court Reporter/ ER: Roberts) (amf) [Entry date 04/10/98]

DATE	DOCKET NUMBER	PROCEEDINGS
4/10/98	—	Pleading of the count(s), Arraignment as to Darlene Green, Not Guilty: Darlene Green (11) count(s) 1s held before Magistrate Judge Paul W. Grimm (Court Reporter/ ER: Roberts) (amf) [Entry date 04/10/98]
4/10/98	—	Pleading of the count(s), Arraignment as to Stanley Hall Sr., Not Guilty: Stanley Hall (13) count(s) 1s held before Magistrate Judge Paul W. Grimm (Court Reporter/ ER: Roberts) (amf) [Entry date 04/10/98]
4/10/98	—	Pleading of the count(s), Arraignment as to Roger Evans, Not Guilty: Roger Evans (14) count(s) 1s held before Magistrate Judge Paul W. Grimm (Court Reporter/ER: Roberts) (amf) [Entry date 04/10/98]
4/13/98	—	ARREST of Nicole Baylor (amf) [Entry date 04/14/98]

DATE	DOCKET NUMBER	PROCEEDINGS
4/13/98	—	Initial appearance as to Nicole Baylor held before Magistrate Judge Paul W. Grimm (Court Reporter/ER: Goldsmith) (Defendant informed of rights.) (amf) [Entry date 04/14/98]
4/17/98	—	Pleading of the count(s), Arraignment as to Marquette Hall, Not Guilty: Marquette Hall (3) count(s) 1s held before Magistrate Judge Paul W. Grimm (Court Reporter/ER: Goldsmith) (amf) [Entry date 04/17/98]
4/17/98	—	Pleading of the count(s), Arraignment as to Jesus Hall, Not Guilty: Jesus Hall (4) count(s) 1s held before Magistrate Judge Paul W. Grimm (Court Reporter/ER: Goldsmith) (amf) [Entry date 04/17/98]

DATE	DOCKET NUMBER	PROCEEDINGS
4/17/98	—	Pleading of the count(s), Arraignment as to Allen Murdock, Not Guilty: Allen Murdock (8) count(s) 1s held before Magistrate Judge Paul W. Grimm (Court Reporter/ER: Goldsmith) (amf) [Entry date 04/17/98]
4/24/98	—	Pleading of the count(s), Arraignment as to Nicole Baylor, Not Guilty: Nicole Baylor (12) count(s) 1 held before Magistrate Judge James K. Bredar (Court Reporter/ER: Smith) (amf) [Entry date 04/24/98]
8/31/98	—	Jury trial - Day 1 - held before Judge Catherine C. Blake as to Stanley Hall, Lamont Thomas, Marquette Hall, Jesus Hall, Leonard Cotton, Matilda Hall, Jovan Powell, Roger Evans, and Darlene Green. (Court Reporter: Paul Mackaro) (kam) [Entry date 09/02/98] [Edit date 09/09/98]

DATE	DOCKET NUMBER	PROCEEDINGS
8/31/98	—	Jurors (Panel #1) Sworn and Examined on Voir Dire as to Stanley Hall (1) count(s) 1s, Lamont Thomas (2) count(s) 1s, Marquette Hall (3) count(s) 1s, Jesus Hall (4) count(s) 1s, Leonard Cotton (5) count(s) 1s, Matilda Hall (6) count(s) 1s, Jovan Powell (7) count(s) 1s, Allen Murdock (8) count(s) 1s, Darlene Green (11) count(s) 1 Terminated motions before Judge Catherine C. Blake. (kam) [Entry date 09/02/98]
9/1/98	—	Jury trial - Day 2 - held before Judge Catherine C. Blake as to Stanley Hall, Lamont Thomas, Marquette Hall, Jesus Hall, Leonard Cotton, Matilda Hall, Jovan Powell, Roger Evans and Darlene Green. (Court Reporter: Paul Mackaro) (kam) [Entry date 09/02/98] [Edit date 09/09/98]

DATE	DOCKET NUMBER	PROCEEDINGS
9/8/98	—	Jury trial - Day 3 - held before Judge Catherine C. Blake as to Stanley Hall, Lamont Thomas, Marquette Hall, Jesus Hall, Leonard Cotton, Matilda Hall, Jovan Powell, Roger Evans and Darlene Green. (Court Reporter: Paul Mackaro) (kam) [Entry date 09/08/98] [Edit date 09/09/98]
9/8/98	—	Jurors (Panel #2) Sworn and Examined on Voir Dire as to Stanley Hall (1) count(s) 1s, Lamont Thomas (2) count(s) 1s, Marquette Hall (3) count(s) 1s, Jesus Hall (4) count(s) 1s, Leonard Cotton (5) count(s) 1s, Matilda Hall (6) count(s) 1s, Jovan Powell (7) count(s) 1s, Roger Evans (14) 1s count(s) 1s, Darlene Green (11) count(s) 1 Terminated motions before Judge Catherine C. Blake. (kam) [Entry date 09/08/98] [Edit date 09/09/98]

DATE	DOCKET NUMBER	PROCEEDINGS
9/8/98	—	Minute entry as to Stanley Hall, Lamont Thomas, Marquette Hall, Jesus Hall, Leonard Cotton, Matilda Hall, Jovan Powell, Allen Murdock, Darlene Green: Jury Panels 1 & 2 continued and examined on Voir Dire. (kam) [Entry date 09/08/98]
9/8/98	—	Jury impaneled as to Stanley Hall, Lamont Thomas, Marquette Hall, Jesus Hall, Leonard Cotton, Matilda Hall, Jovan Powell, Allen Murdock and Darlene Green before Blake, J. (kam) [Entry date 09/08/98] [Edit date 09/08/98]
9/9/98	—	Jury trial - Day 4 - held before Judge Catherine C. Blake as to Stanley Hall, Lamont Thomas, Marquette Hall, Jesus Hall, Leonard Cotton, Matilda Hall, Jovan Powell, Allen Murdock and Darlene Green. (Court Reporter: Paul Mackaro) (kam) [Entry date 09/09/98]

DATE	DOCKET NUMBER	PROCEEDINGS
9/9/98	—	Jury sworn as to Stanley Hall, Lamont Thomas, Marquette Hall, Jesus Hall, Leonard Cotton, Matilda Hall, Jovan Powell, Allen Murdock and Darlene Green before Blake, J. (kam) [Entry date 09/09/98]
9/9/98	—	Opening Statements made by counsel for the USA, Stanley Hall, Lamont Thomas, Marquette Hall, Jesus Hall, Leonard Cotton, Matilda Hall, Jovan Powell and Allen Murdock. (kam) [Entry date 09/09/98]
9/9/98	—	Minute entry as to Darlene Green: Opening Statement by counsel reserved at this time. (kam) [Entry date 09/09/98]
9/10/98	—	Jury trial - Day 5 - held before Judge Catherine C. Blake as to Stanley Hall, Lamont Thomas, Marquette Hall, Jesus Hall, Leonard Cotton, Matilda Hall, Jovan Powell, Darlene Green and Roger Evans. (Court Reporter: Paul Mackaro) (kam) [Entry date 09/10/98]

DATE	DOCKET NUMBER	PROCEEDINGS
9/14/98	—	Jury trial - Day 6 - held before Judge Catherine C. Blake as to Stanley Hall, Lamont Thomas, Marquette Hall, Jesus Hall, Leonard Cotton, Matilda Hall, Jovan Powell, Darlene Green and Roger Evans. (Court Reporter: Paul Mackaro) (kam) [Entry date 09/14/98]
9/15/98	—	Jury trial - Day 7 - held before Judge Catherine C. Blake as to Stanley Hall, Lamont Thomas, Marquette Hall, Jesus Hall, Leonard Cotton, Matilda Hall, Jovan Powell, Darlene Green and Roger Evans. (Court Reporter: Paul Mackaro) (kam) [Entry date 09/15/98]
9/16/98	—	Jury trial - Day 8 - held before Judge Catherine C. Blake as to Stanley Hall, Lamont Thomas, Marquette Hall, Jesus Hall, Leonard Cotton, Matilda Hall, Jovan Powell, Darlene Green and Roger Evans. (Court Reporter: Paul Mackaro) (kam) [Entry date 09/16/98]

DATE	DOCKET NUMBER	PROCEEDINGS
9/17/98	—	Jury trial - Day 9 - held before Judge Catherine C. Blake as to Stanley Hall, Lamont Thomas, Marquette Hall, Jesus Hall, Leonard Cotton, Matilda Hall, Jovan Powell, Darlene Green and Roger Evans. (Court Reporter: Paul Mackaro) (kam) [Entry date 09/17/98]
9/22/98	—	Jury trial - Day 10 - held before Judge Catherine C. Blake as to Stanley Hall, Lamont Thomas, Marquette Hall, Jesus Hall, Leonard Cotton, Matilda Hall, Jovan Powell, Darlene Green and Roger Evans. (Court Reporter: Paul Mackaro) (kam) [Entry date 09/22/98]
9/23/98	—	Jury trial - Day 11 - held before Judge Catherine C. Blake as to Stanley Hall, Lamont Thomas, Marquette Hall, Jesus Hall, Leonard Cotton, Matilda Hall, Jovan Powell, Darlene Green and Roger Evans. (Court Reporter: Paul Mackaro) (kam) [Entry date 09/23/98]

DATE	DOCKET NUMBER	PROCEEDINGS
9/28/98	—	Jury trial - Day 12 - held before Judge Catherine C. Blake as to Stanley Hall, Lamont Thomas, Marquette Hall, Jesus Hall, Leonard Cotton, Matilda Hall, Jovan Powell, Darlene Green and Roger Evans. (Court Reporter: Paul Mackaro) (kam) [Entry date 09/29/98]
9/29/98	—	Jury trial - Day 13 - held before Judge Catherine C. Blake as to Stanley Hall, Lamont Thomas, Marquette Hall, Jesus Hall, Leonard Cotton, Matilda Hall, Jovan Powell, Darlene Green and Roger Evans. (Court Reporter: Paul Mackaro) (kam) [Entry date 09/29/98]
10/1/98	—	Jury trial - Day 14 - held before Judge Catherine C. Blake as to Stanley Hall, Lamont Thomas, Marquette Hall, Jesus Hall, Leonard Cotton, Matilda Hall, Jovan Powell, Darlene Green and Roger Evans. (Court Reporter: Paul Mackaro) (kam) [Entry date 10/01/98]

DATE	DOCKET NUMBER	PROCEEDINGS
10/5/98	—	Jury trial - Day 15 - held before Judge Catherine C. Blake as to Stanley Hall, Lamont Thomas, Marquette Hall, Jesus Hall, Leonard Cotton, Matilda Hall, Jovan Powell, Darlene Green and Roger Evans. (Court Reporter: Paul Mackaro) (kam) [Entry date 10/05/98]
10/6/98	—	Jury trial - Day 16 - held before Judge Catherine C. Blake as to Stanley Hall, Lamont Thomas, Marquette Hall, Jesus Hall, Leonard Cotton, Matilda Hall, Jovan Powell, Darlene Green and Roger Evans. (Court Reporter: Paul Mackaro) (kam) [Entry date 10/06/98]
10/7/98	—	Jury trial - Day 17 - held before Judge Catherine C. Blake as to Stanley Hall, Lamont Thomas, Marquette Hall, Jesus Hall, Leonard Cotton, Matilda Hall, Jovan Powell, Darlene Green and Roger Evans. (Court Reporter: Paul Mackaro) (kam) [Entry date 10/07/98]

DATE	DOCKET NUMBER	PROCEEDINGS
10/8/98	—	Jury trial - Day 18 - held before Judge Catherine C. Blake as to Stanley Hall, Lamont Thomas, Marquette Hall, Jesus Hall, Leonard Cotton, Matilda Hall, Jovan Powell, Darlene Green and Roger Evans. (Court Reporter: Paul Mackaro) (kam) [Entry date 02/25/99]
10/19/98	—	Jury trial - Day 19 - held before Judge Catherine C. Blake as to Stanley Hall, Lamont Thomas, Marquette Hall, Jesus Hall, Leonard Cotton, Matilda Hall, Jovan Powell, Darlene Green and Roger Evans. (Court Reporter: Paul Mackaro) (kam) [Entry date 10/19/98]
10/20/98	—	Jury trial - Day 20 - held before Judge Catherine C. Blake as to Stanley Hall, Lamont Thomas, Marquette Hall, Jesus Hall, Leonard Cotton, Matilda Hall, Jovan Powell, Darlene Green and Roger Evans. (Court Reporter: Paul Mackaro) (kam) [Entry date 10/20/98]

DATE	DOCKET NUMBER	PROCEEDINGS
10/21/98	—	Jury trial - Day 21 - held before Judge Catherine C. Blake as to Stanley Hall, Lamont Thomas, Marquette Hall, Jesus Hall, Leonard Cotton, Matilda Hall, Jovan Powell, Darlene Green and Roger Evans. (Court Reporter: Paul Mackaro) (kam) [Entry date 10/21/98]
10/21/98	—	Minute entry as to Stanley Hall, Lamont Thomas, Marquette Hall, Jesus Hall, Leonard Cotton, Matilda Hall, Jovan Powell, Darlene Green, Roger Evans: Stipulation of United States and Defense Counsel read into the record re: Drugs seized and weight. (kam) [Entry date 10/22/98]
10/22/98	—	Jury trial - Day 22 - held before Judge Catherine C. Blake as to Stanley Hall, Lamont Thomas, Marquette Hall, Jesus Hall, Leonard Cotton, Matilda Hall, Jovan Powell, Darlene Green and Roger Evans. (Court Reporter: Paul Mackaro) (kam) [Entry date 10/22/98]

DATE	DOCKET NUMBER	PROCEEDINGS
10/23/98	—	Jury trial - Day 23 - held before Judge Catherine C. Blake as to Stanley Hall, Lamont Thomas, Marquette Hall, Jesus Hall, Leonard Cotton, Matilda Hall, Jovan Powell, Darlene Green and Roger Evans. (Court Reporter: Paul Mackaro) (kam) [Entry date 10/23/98]
10/23/98	—	ORAL MOTION by Stanley Hall, Lamont Thomas, Marquette Hall, Jesus Hall, Leonard Cotton, Matilda Hall, Jovan Powell and Darlene Green for Judgment of Acquittal at the conclusion of the Government's case-in-chief. (kam) [Entry date 10/23/98] [Edit date 10/23/98]
10/23/98	—	ORAL ORDER "DENYING" [0-0] oral motion for Judgment of Acquittal made at the conclusion of the Government's case-in-chief as to Stanley Hall (1), Lamont Thomas (2), Marquette Hall (3), Jesus Hall (4), Leonard Cotton (5), Matilda Hall (6), Jovan Powell (7), Darlene

DATE	DOCKET NUMBER	PROCEEDINGS
		Green (11). (Judge Catherine C. Blake 10/23/98) (kam) [Entry date 10/23/98] [Edit date 10/23/98]
10/29/98	—	Jury trial - Day 24 - held before Judge Catherine C. Blake as to Stanley Hall, Lamont Thomas, Marquette Hall, Jesus Hall, Leonard Cotton, Matilda Hall, Jovan Powell, Darlene Green and Roger Evans. (Court Reporter: Paul Mackaro) (kam) [Entry date 10/29/98]
10/29/98	—	ORAL MOTION by Stanley Hall, Lamont Thomas, Marquette Hall, Jesus Hall, Leonard Cotton, Matilda Hall, Jovan Powell, Darlene Green and Roger Evans for Judgment of Acquittal renewed at the conclusion of the government's case-in-chief. (kam) [Entry date 10/29/98]

DATE	DOCKET NUMBER	PROCEEDINGS
10/29/98	—	ORAL ORDER "DENYING" [0-0] oral motion for Judgment of Acquittal as to Stanley Hall (1), Lamont Thomas (2), Marquette Hall (3), Jesus Hall (4), Leonard Cotton (5), Matilda Hall (6), Jovan Powell (7), Darlene Green (11), Roger Evans (14). (Judge Catherine C. Blake 10/29/98) (kam) [Entry date 10/29/98]
10/30/98	—	Jury trial - Day 25 - held before Judge Catherine C. Blake as to Stanley Hall, Lamont Thomas, Marquette Hall, Jesus Hall, Leonard Cotton, Matilda Hall, Jovan Powell, Darlene Green and Roger Evans. (Court Reporter: Paul Mackaro) (kam) [Entry date 10/30/98]
11/3/98	—	Jury trial - Day 26 - held before Judge Catherine C. Blake as to Stanley Hall, Lamont Thomas, Marquette Hall, Jesus Hall, Leonard Cotton, Matilda Hall, Jovan Powell, Darlene Green and Roger Evans. (Court Reporter: Paul Mackaro) (kam) [Entry date 11/03/98]

DATE	DOCKET NUMBER	PROCEEDINGS
11/3/98	—	Court's Charge to the Jury as to Stanley Hall, Lamont Thomas, Marquette Hall, Jesus Hall, Leonard Cotton, Matilda Hall, Jovan Powell, Darlene Green and Roger Evans. (kam) [Entry date 11/03/98]
11/4/98	—	Jury trial - Day 27 - held before Judge Catherine C. Blake as to Stanley Hall, Lamont Thomas, Marquette Hall, Jesus Hall, Leonard Cotton, Matilda Hall, Jovan Powell, Darlene Green and Roger Evans. (Court Reporter: Paul Mackaro) (kam) [Entry date 11/04/98]
11/4/98	—	Closing Statements by Counsel for Stanley Hall, Lamont Thomas, Marquette Hall, Leonard Cotton, Jovan Powell and USA. (kam) [Entry date 11/04/98]

DATE	DOCKET NUMBER	PROCEEDINGS
11/5/98	—	Jury trial - Day 28 - held before Judge Catherine C. Blake as to Stanley Hall, Lamont Thomas, Marquette Hall, Jesus Hall, Leonard Cotton, Matilda Hall, Jovan Powell, Darlene Green and Roger Evans. (Court Reporter: Paul Mackaro) (kam) [Entry date 11/05/98]
11/5/98	—	Closing Statements by Counsel for Jesus Hall, Matilda Hall, Roger Evans and Rebuttal Argument of USA. (kam) [Entry date 11/05/98]
11/5/98	—	Conclusion of Court's Charge to the Jury as to Stanley Hall, Lamont Thomas, Marquette Hall, Jesus Hall, Leonard Cotton, Matilda Hall, Jovan Powell, Darlene Green and Roger Evans. (kam) [Entry date 11/06/98]

DATE	DOCKET NUMBER	PROCEEDINGS
11/9/98	—	Jury trial - Day 29 - held before Judge Catherine C. Blake as to Stanley Hall, Lamont Thomas, Marquette Hall, Jesus Hall, Leonard Cotton, Matilda Hall, Jovan Powell, Darlene Green and Roger Evans. (Court Reporter: Paul Mackaro) (kam) [Entry date 11/10/98]
11/9/98	—	Minute entry as to Stanley Hall, Lamont Thomas, Marquette Hall, Jesus Hall, Leonard Cotton, Matilda Hall, Jovan Powell, Darlene Green and Roger Evans: Jury returned to the Jury Room to continue their deliberations. (kam) [Entry date 11/10/98]
11/9/98	—	Minute entry as to Stanley Hall, Lamont Thomas, Marquette Hall, Jesus Hall, Leonard Cotton, Matilda Hall, Jovan Powell, Darlene Green and Roger Evans: Jury returned to the Bar of the Court for further instruction and was given a modified Allen charge. (kam) [Entry date 11/10/98]

DATE	DOCKET NUMBER	PROCEEDINGS
11/9/98	—	VERDICT: "GUILTY" as to Defendants Stanley Hall, Jr., Lamont Thomas, Jesus Hall, Jovan Powell, Marquette Hall, Leonard Cotton, Matilda Hall and Darlene Green; "NOT GUILTY" as to Defendant, Roger Evans as to Count 1 of the Superseding Indictment. (kam) [Entry date 11/10/98]
11/9/98	—	Minute entry as to Stanley Hall, Lamont Thomas, Marquette Hall, Jesus Hall, Leonard Cotton, Matilda Hall, Jovan Powell, Darlene Green and Roger Evans: Jury polled at the request of defense counsel. (kam) [Entry date 11/10/98]
1/29/99	285	JUDGMENT Roger Evans (14) count(s) 1. ACQUITTED (Signed by Judge Catherine C. Blake 1/29/99) (c/m cc BOP/USMS 2/1/99-dl) (microfilmed 2/1/99) (jb) (dl) [Entry date 02/01/99]

DATE	DOCKET NUMBER	PROCEEDINGS
2/12/99	—	Sentencing Darlene Green (11) count(s) 1 held before Judge Catherine C. Blake (CR: L.Bankins) (dl) [Entry date 02/19/99] [Edit date 05/10/99]
2/12/99	—	Sentencing Leonard Cotton (5) count(s) 1s held before Judge Catherine C. Blake (CR: L.Bankins) (dl) [Entry date 02/19/99] [Edit date 02/23/99]
2/12/99	—	Sentencing Marquette Hall (3) count(s) 1s held before Judge Catherine C. Blake (CR: L.Bankins) (dl) [Entry date 02/19/99] [Edit date 02/23/99]
2/26/99	—	Sentencing Lamont Thomas (2) count(s) 1s, Jesus Hall (4) count(s) 1s held before Judge Catherine C. Blake (Court Reporter: Lisa Bankins) (mdw) [Entry date 03/01/99]
2/26/99	—	Sentencing: Jesus Hall (4) count(s) 1s held before Judge Catherine C. Blake. (Court Reporter: Lisa Bankins) (kam) [Entry date 03/12/99]

DATE	DOCKET NUMBER	PROCEEDINGS
3/2/99	289	JUDGMENT Darlene Green (11) count(s) 1. Imprisonment for a total term of 180 months; Supervised Release for a total term of 60 months with special condition of participation in substance abuse evaluation/ treatment program; Special Assessment $100.00; Fine $1.00 (Signed by Judge Catherine C. Blake 3/2/99) (c/m, cc-BOP/USMS, microfilmed, jb 3/3/99-dl) (dl) [Entry date 03/03/99]
3/2/99	290	JUDGMENT Leonard Cotton (5) count(s) 1s. Imprisonment for a total term of Life; Supervised Release for a total term of 60 months; Special Assessment $100.00 (Signed by Judge Catherine C. Blake 3/2/99) (c/m, cc-BOP/USMS, microfilmed, jb 3/3/99-dl) (dl) [Entry date 03/03/99]

DATE	DOCKET NUMBER	PROCEEDINGS
3/2/99	291	JUDGMENT Marquette Hall (3) count(s) 1s. Imprisonment for a total term of Life; Supervised Release for a total term of 60 months; Special Assessment $100.00 (Signed by Judge Catherine C. Blake 3/2/99) (c/m, cc-BOP/USMS, microfilmed, jb 3/3/99-dl) (dl) [Entry date 03/03/99]
3/3/99	292	NOTICE OF APPEAL by Leonard Cotton (5) (Received 2/12/99) count(s) 1s FILING FEE $ (Filing fee not required) (c/s) (ac) [Entry date 03/03/99]
3/3/99	—	Notice of appeal and certified copy of docket as to Leonard Cotton to USCA: [292-1] appeal (Appeal forms mailed to counsel) (ac) [Entry date 03/03/99]
3/3/99	293	NOTICE OF APPEAL by Marquette Hall (3) (Received 2/16/99) count(s) 1s FILING FEE $ (Filing fee not required) (c/s) (ac) [Entry date 03/03/99]

DATE	DOCKET NUMBER	PROCEEDINGS
3/3/99	294	NOTICE OF APPEAL by Darlene Green (11) (Received 2/17/99) count(s) 1 FILING FEE $ (Filing fee not required) (c/s) (ac) [Entry date 03/03/99]
3/3/99	—	Notice of appeal and certified copy of docket as to Darlene Green to USCA: [294-1] appeal (Appeal forms mailed to counsel) (ac) [Entry date 03/03/99]
3/4/99	—	Sentencing: Jovan Powell (7) count(s) 1s held before Judge Catherine C. Blake. (Court Reporter: Lisa Bankins) (kam) [Entry date 03/04/99]
3/4/99	—	Sentencing: Matilda Hall (6) count 1s held before Judge Catherine C. Blake. (Court Reporter: Lisa Bankins) (kam) [Entry date 03/04/99]

DATE	DOCKET NUMBER	PROCEEDINGS
3/5/99	295	JUDGMENT Jesus Hall (4) count(s) 1s. Imprisonment for a total term of Life; Supervised Release for a total term of 60 months; Special Assessment $100.00 (Signed by Judge Catherine C. Blake 3/4/99) (c/m, cc BOP/USMS, microfilmed, jb 3/5/99- dl) (dl) [Entry date 03/05/99]
3/5/99	296	JUDGMENT Lamont Thomas (2) count(s) 1s. Imprisonment for a total term of Life; Supervised Release for a total term of 60 months; Special Assessment $100.00 (Signed by Judge Catherine C. Blake 3/4/99) (c/m, cc BOP/USMS, microfilmed, jb 3/5/99- dl) (dl) [Entry date 03/05/99]
3/5/99	—	Sentencing: Stanley Hall (1) as to count 1s held before Judge Catherine C. Blake. (Court Reporter: Lisa Bankins) (dl) [Entry date 03/05/99]

DATE	DOCKET NUMBER	PROCEEDINGS
3/5/99	297	NOTICE OF APPEAL by Lamont Thomas (2) count(s) 1s FILING FEE $ (Filing fee not required) (c/s) (ac) [Entry date 03/05/99]
3/5/99	—	Notice of appeal and certified copy of docket as to Lamont Thomas to USCA: [297-1] appeal (Appeal forms mailed to counsel) (ac) [Entry date 03/05/99]
3/5/99	300	ORDER as to Stanley Hall, Lamont Thomas, Marquette Hall, Jesus Hall, Leonard Cotton, Matilda Hall, Jovan Powell DISMISSING the original indictment. (Signed by Judge Catherine C. Blake 3/5/99) (c/m , cc BOP/USMS, jb, microfilmed 3/8/99-dl) (dl) [Entry date 03/08/99]

DATE	DOCKET NUMBER	PROCEEDINGS
3/8/99	302	JUDGMENT Stanley Hall (1) count(s) 1s. Imprisonment for a total term of Life; Supervised Release for a total term of 60 months; Special Assessment $100.00. (Signed by Judge Catherine C. Blake 3/8/99) (cc USMS 3/8/99-chambers) (c/m cc BOP 3/9/99-dl) (jb) (microfilmed 3/9/99) (dl) [Entry date 03/09/99]
3/8/99	303	JUDGMENT Jovan Powell (7) count(s) 1s. Imprisonment for a total term of 360 months; Supervised Release for a total term of 60 months with special condition of participation in a drug evaluation/ treatment program; Special Assessment $100.00. (Signed by Judge Catherine C. Blake 3/8/99) (3cc BOP 3/8/99-chambers) (c/m, cc-BOP, microfilmed, jb 3/9/99-dl) (dl) [Entry date 03/09/99]

DATE	DOCKET NUMBER	PROCEEDINGS
3/8/99	314	JUDGMENT Matilda Hall (6) count(s) 1s. Imprisonment for a total term of 360 months; Supervised Release for a total term of 60 months with conditions of mental health evaluation and Drug/Alcohol evaluation/treatment programs; Special Assessment $100.00 (Signed by Judge Catherine C. Blake 3/8/99) (c/m, cc BOP/USMS, microfilmed, jb 3/9/99-dl) (dl) [Entry date 03/09/99]
3/8/99	315	NOTICE OF APPEAL by Jovan Powell (7) (Received 3/4/99) count(s) 1s (Filing fee not required) (c/s) (ac) [Entry date 03/12/99]
3/11/99	316	NOTICE OF APPEAL by Jesus Hall (4) count(s) 1s (Filing fee not required) (ac) [Entry date 03/12/99]
3/12/99	—	Notice of appeal and certified copy of docket as to Jesus Hall, Jovan Powell to USCA: [316-1] appeal, [315-1] appeal (Appeal forms mailed to attorneys) (ac) [Entry date 03/12/99]

DATE	DOCKET NUMBER	PROCEEDINGS
3/12/99	317	NOTICE OF APPEAL by Matilda Hall (6) count(s) 1s FILING FEE $ (Filing fee not required) (c/s) (ac) [Entry date 03/15/99]
3/12/99	318	NOTICE OF APPEAL by Stanley Hall (1) count(s) 1s FILING FEE $ (Filing fee not paid) (c/s) (ac) [Entry date 03/16/99]
3/15/99	—	Notice of appeal and certified copy of docket as to Matilda Hall to USCA: [293-1] appeal (Appeal forms mailed to counsel) (ac) [Entry date 03/15/99]
3/16/99	—	Notice of appeal and certified copy of docket as to Stanley Hall to USCA: [318-1] appeal (Appeal forms mailed to counsel) (ac) [Entry date 03/16/99]

DATE	DOCKET NUMBER	PROCEEDINGS
1/5/00	354	COPY OF CERTIFICATE OF CLERK certifying record is complete for appeal purposes for [318-1] appeal, [317-1] appeal, [316-1] appeal, [315-1] appeal, [297-1] appeal, [294-1] appeal, [293-1] appeal, [292-1] appeal as to Stanley Hall, Lamont Thomas, Marquette Hall, Jesus Hall, Leonard Cotton, Matilda Hall, Jovan Powell, Allen Murdock, Carla Malloy, James D. Gibson, Darlene Green, Nicole Baylor, Stanley Hall Sr, Roger Evans (ac) [Entry date 01/05/00]
6/1/00	377	ORDER as to Lamont Thomas, Marquette Hall, Darlene Green, Jesus Hall, Jovan Powell, Matilda Hall, Stanley Hall, Leonard Cotton denying their [365-1] motion for New Trial as to Leonard Cotton (5), denying [363-1] motion for New Trial as to Stanley Hall (1), denying [362-1] motion for New Trial as to Matilda Hall (6), denying [361-1]

DATE	DOCKET NUMBER	PROCEEDINGS
		motion for New Trial as to Jovan Powell (7), denying [360-1] motion for New Trial as to Jesus Hall (4), denying [359-1] motion for New Trial as to Darlene Green (11), denying [358-1] motion to Adopt Motion of Co-Defendant Lamont Thomas for new trial as to Marquette Hall (3), denying [357-1] motion for New Trial as to Lamont Thomas (2). (Signed by Judge Catherine C. Blake 6/1/00) (c/m 6/1/00-bc) (das) [Entry date 06/01/00]
7/28/00	379	COPY OF SUPPLEMENT CERTIFICATE OF CLERK certifying record is complete for appeal purposes for [318-1] appeal, [317-1] appeal, [316-1] appeal, [315-1] appeal, [297-1] appeal, [294-1] appeal, [293-1] appeal, [292-1] appeal as to Stanley Hall, Lamont Thomas, Marquette Hall, Jesus Hall, Leonard Cotton, Matilda Hall, Jovan Powell, Allen Murdock,

DATE	DOCKET NUMBER	PROCEEDINGS
		Carla Malloy, James D. Gibson, Darlene Green, Nicole Baylor, Stanley Hall Sr, Roger Evans (ac) [Entry date 07/28/00]
10/12/00	382	CERTIFICATE OF CLERK certifying record is complete for appeal purposes for [318-1] appeal, [317-1] appeal, [316-1] appeal, [315-1] appeal, [297-1] appeal, [294-1] appeal, [293-1] appeal, [292-1] appeal as to Stanley Hall, Lamont Thomas, Marquette Hall, Jesus Hall, Leonard Cotton, Matilda Hall, Jovan Powell, Darlene Green (bh) [Entry date 10/12/00]
5/4/01	—	Certified and transmitted record on appeal to U.S. Court of Appeals as to Stanley Hall, Lamont Thomas, Marquette Hall, Jesus Hall, Leonard Cotton, Matilda Hall, Jovan Powell, Darlene Green: [318-1] appeal, [317-1] appeal, [316-1] appeal, [315-1] appeal, [297-1] appeal, [294-1] appeal, [293-1] appeal, [292-1] appeal (vols. 1 thru 72) (ko) [Entry date 05/04/01]

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 99-4162

UNITED STATES OF AMERICA, PLAINTIFF

v.

LEONARD COTTON, DEFENDANT

RELEVANT DOCKET ENTRIES

DATE	PROCEEDINGS
3/9/99	Criminal case docketed. (ldj) [99-4162]
3/12/99	CLERK ORDER FILED consolidating case 99-4163 99-4164 99-4175 with 99-4162 [2949283-1]. Copies to all counsel.
3/17/99	CLERK ORDER FILED consolidating case 99-4189 99-4190, 99-4191 with 99-4162 [2952446-1]. Copies to all counsel.
12/7/00	Corrected brief and joint appendix filed by Appellant Leonard Cotton in 99-4162, Appellant Darlene Green in 99-4163, Appellant Marquette Hall in 99-4164, Appellant Lamont Thomas in 99-4175, Appellant Matilda Hall in 99-4189, Appellant Jovan Powell in 99-4190, Appellant Jesus Hall in 99-4191, Appellant Stanley Hall in 99-4197.

DATE	PROCEEDINGS
2/9/01	Brief filed by Appellee US in 99-4162, Appellee US in 99-4163, Appellee US in 99-4164, Appellee US in 99-4175, Appellee US in 99-4189, Appellee US in 99-4190, Appellee US in 99-4191, Appellee US in 99-4197.
2/20/01	Reply brief filed by Appellant Leonard Cotton in 99-4162, Appellant Darlene Green in 99-4163, Appellant Marquette Hall in 99-4164, Appellant Lamont Thomas in 99-4175, Appellant Matilda Hall in 99-4189, Appellant Jovan Powell in 99-4190, Appellant Jesus Hall in 99-4191, Appellant Stanley Hall in 99-4197.
4/4/01	Oral argument heard. Thomas J. Saunders for Appellant Leonard Cotton in 99-4162, Christine Manuelian for Appellee US in 99-4162, Walter Charles McCord (present but did not argue) for Appellant Darlene Green in 99-4163, Christine Manuelian for Appellee US in 99-4163, Arthur Samuel Cheslock for Appellant Marquette in 99-4164, Christine Manuelian for Appellee US in 99-4164, Christine Manuelian for Appellee US in 99-4175, Christine Manuelian for Appellee US in 99-4189, William Henry Klumpp (present but did not argue) for Appellant Jovan Powell in 99-4190, Christine Manuelian for Appellee US in 99-4190, John David Ash (present but did not argue) for Appellant Jesus Hall in 99-4191, Christine Manuelian for Appellee US in 99-4191, Stanley Howard Needleman (present but did not argue) for Appellant Stanley Hall in 99-4197, Christine Manuelian for Appellee US in 99-4197 Courtroom Deputy: tsb.
8/10/01	Published, authored opinion filed.
8/10/01	Judgment order filed. Decision: affirmed in part and vacated and remanded in part. Dissenting opinion filed. EOD Date: 8/10/01.
8/17/01	Order amending opinion filed.
11/6/01	Letter indicating that a petition for writ of certiorari has been filed in the United States Supreme Court on 10/31/01 by Appellee US in 99-4162, Appellee US in 99-4163, Appellee US in 99-4164, Appellee US in 99-4175, Appellee US in 99-4189, Appellee US in 99-4190, Appellee US in 99-4191, Appellee US in 99-4197.
11/19/01	Supreme Court notice that petition for certiorari was filed on 10/31/01.

DATE	PROCEEDINGS
1/11/02	Supreme Court order received granting petition for certiorari [3491125-1] on 01/04/02 in 99-4162, petition for certiorari [3491125-1] on 01/04/02 in 99-4164, petition for certiorari [3491125-1] on 01/04/02 in 99-4175, petition for certiorari [3491125-1] on 01/04/02 in 99-4189, petition for certiorari [3491125-1] on 01/04/02 in 99-4190, petition for certiorari [3491125-1] on 01/04/02 in 99-4191, petition for certiorari [3491125-1] on 01/04/02 in 99-4197.

UNITED STATES DISTRICT COURT FOR THE
DISTRICT OF MARYLAND

Criminal No. CCB-97-0365

UNITED STATES OF AMERICA

v.

STANLEY HALL, A/K/A "BOONIE,"
LAMONT THOMAS, A/K/A "TREE,"
MARQUETTE HALL, A/K/A "BUTT NAKED,"
JESUS HALL, A/K/A "WEEDY," A/K/A JESSE HAIL,
LEONARD COTTON, A/K/A "COOCH,"
MATILDA HALL,
JOVAN POWELL,
ALLEN MURDOCK, A/K/A COLLIN MURDOCK,
CARLA MALLOY, A/K/A "STINKY-WOO," DEFENDANTS

(Conspiracy to Distribute and Possess with Intent to Distribute Cocaine Hydrochloride and Cocaine Base; 21 U.S.C. §846)

INDICTMENT

The Grand Jury for the District of Maryland charges that:

COUNT ONE

Beginning in or about February, 1996, up to and including May 2, 1997 within the State and District of Maryland, the State of New York, and elsewhere,

STANLEY HALL, A/K/A "BOONIE,"
LAMONT THOMAS, A/K/A "TREE,"
JESUS HALL, A/K/A "WEEDY," A/K/A JESSE HAIL,
LEONARD COTTON, A/K/A "COOCH,"
MATILDA HALL,
JOVAN POWELL,
ALLEN MURDOCK, A/K/A COLLIN MURDOCK,
CARLA MALLOY, A/K/A "STINKY-WOO"

defendants herein, did knowingly, intentionally and unlawfully combine, conspire, confederate and agree with each other and with persons known and unknown to the Grand Jury, to knowingly, unlawfully and intentionally distribute and possess with intent to distribute five kilograms or more of a mixture or substance containing a detectable amount of cocaine hydrochloride, a Schedule II narcotic controlled substance, and 50 grams or more of a mixture or substance containing a detectable amount of cocaine base, commonly known as "crack," also a Schedule II narcotic controlled substance, all in violation of Title 21, United States Code, §841(a)(1).

OBJECT OF THE CONSPIRACY

At all times material herein, the object of the charged defendants and other coconspirators was to obtain quantities of cocaine hydrochloride and cocaine base with the intent to distribute said substance for the purpose of making money.

METHOD AND MEANS USED TO FACILITATE THE CONSPIRACY

Among the methods and means used by the defendants and other coconspirators to carry out the object of the conspiracy were the following:

a. Certain members of the conspiracy maintained distinct roles in furthering the objectives of the conspiracy. STANLEY HALL, a/k/a "Boonie," supervised the organization and provided the cocaine for distribution. LAMONT THOMAS, a/k/a "Tree," LEONARD COTTON, a/k/a "Cooch," and JOVAN POWELL acted as lieutenants for the organization by overseeing the day to day street level distribution of STANLEY HALL'S cocaine. MARQUETTE HALL, a/k/a "Butt Naked," supervised the use of juveniles in the street level distribution of STANLEY HALL'S cocaine. JESUS HALL, a/k/a "Weedy," a/k/a Jesse Hail, and ALLEN MURDOCK, a/k/a Collin Murdock, obtained multi-ounce quantities of cocaine from STANLEY HALL for distribution in the Fayette and Duncan Street area. MATILDA HALL stashed cocaine, guns, and drug proceeds for the organization in her residence at 847 McHenry Street and acted as a conduit for information flowing between members of the organization relevant to their drug trafficking. CARLA MALLOY, a/k/a "Stinky-Woo," assisted in the operation of the stash houses used by the organization and acted as a street-level distributor of the organization's cocaine.

b. Members of the conspiracy used firearms and other means to protect their cocaine, the cash proceeds derived from the street level distribution of their cocaine, and their area of drug distribution.

c. Members of the conspiracy used different locations, including vacant houses, to stash and secrete their drugs, drug proceeds, firearms, and other drug paraphernalia, including, but not limited to, the following locations in Baltimore, Maryland; 1313 North Aisquith Street, 847 McHenry Street, 2432 Fait Ave-

nue, and residences on North Duncan Street numbered 213, 216, 217, 223, 225, 229, 231.

d. In order to maintain their ongoing drug operation, members of the conspiracy used cellular telephones and digital display pagers, or beepers, to maintain contact with one another.

e. Certain members of the conspiracy acted as the street distributors of STANLEY HALL'S cocaine. These individuals would be provided with packets containing up to 100 bags of cocaine. Money obtained from the sale of these packets would be collected by the lieutenants of the organization and given to STANLEY HALL. The lieutenants would also resupply the street level dealers. The area of street level distribution utilized by members of this conspiracy was at or near the intersection surrounding the 2100 block of Fayette Street and the 200 block of North Duncan Street in Baltimore, Maryland. The hours of operation were 24 hours per day, seven days a week, and the street level distributors would work in 12 hour shifts.

f. Members of the conspiracy paid individuals to act as "lookouts" to maintain the integrity of the drug operation by warning the coconspirators distributing cocaine on the street if law enforcement officers were in the vicinity of the operation.

g. Members of the organization employed juveniles to assist in the daily operation of the conspiracy and thereby minimize law enforcement intrusion into the organization. The juvenile members of the conspiracy acted as street level distributors and "lookouts," and performed whatever other tasks were requested of them by the adult members of the conspiracy to assist in the distribution of STANLEY HALL'S cocaine.

OVERT ACTS

In furtherance of the conspiracy, and to effect the object thereof, members of the conspiracy did perform, participate in, and commit the following acts, among others:

1. On or about February 23, 1996, members of the conspiracy had in their possession 272 bags of cocaine hydrochloride, a loaded 22 caliber revolver, various rounds of ammunition, a police scanner, approximately $55.00 in U.S. currency, and a drug tally sheet with the name "Stan" in the first floor area of 231 North Duncan Street, which is a stash house used by the STANLEY HALL organization.

2. On or about April 16, 1996, an unindicted coconspirator possessed 2 bags of cocaine hydrochloride in the 200 block of North Duncan Street.

3. On or about April 18, 1996, an unindicted juvenile coconspirator possessed $223 in U.S. currency in the 200 block of North Duncan Street.

4. On or about April 24, 1996, members of the conspiracy, including an unindicted juvenile coconspirator, possessed 19 bags of crack cocaine, 1 bag of cocaine hydrochloride, and a 22 caliber Marlin rifle in 232 North Duncan Street, a stash house used by the STANLEY HALL organization.

5. On or about April 25, 1996, an unindicted coconspirator and an unindicted juvenile coconspirator working under the supervision of LEONARD COTTON, a/k/a "Cooch," in the 200 block of North Duncan Street sold 1 bag of crack cocaine to an undercover police officer for $10.00.

6. On or about April 25, 1996, LEONARD COTTON, a/k/a "Cooch," possessed $213 in U.S. currency in the 200 block of North Duncan Street.

7. On or about April 25, 1996, an unindicted juvenile coconspirator possessed $128 in U.S. currency in the 200 block of North Duncan Street.

8. On or about April 25, 1996, members of the conspiracy possessed 8 bags of crack cocaine in an alleyway off of the 200 block of North Duncan Street.

9. On or about May 17, 1996, members of the conspiracy possessed 22 bags of crack cocaine, drug packaging, a radio scanner, a cellular telephone, a machete, and a police nightstick in 231 North Duncan Street, which was a stash house utilized by the STANLEY HALL organization.

10. On or about June 11, 1996, MARQUETTE HALL, a/k/a "Butt Naked," and LAMONT THOMAS, a/k/a "Tree," supervised drug transactions in the 200 block of North Duncan Street involving, among others, an unindicted juvenile coconspirators [sic] and utilized 225 North Duncan Street as a stash house.

11. On or about June 26, 1996, MARQUETTE HALL, a/k/a "Butt Naked," directed a purchaser of narcotics to an unindicted juvenile coconspirator in the 200 block of North Duncan Street for the purpose of purchasing 3 bags of crack cocaine.

12. On or about June 26, 1996, LAMONT THOMAS, a/k/a "Tree," acted as a "lookout" for the drug organization while drug transactions were taking place in the 200 block of North Duncan Street.

13. On or about July 15, 1996, members of the conspiracy possessed 12 bags of crack cocaine and

approximately $177.00 in U.S. currency in 229 North Duncan Street, which was a stash house used by the STANLEY HALL organization.

14. On or about July 15, 1996, members of the conspiracy possessed 9 bags of crack cocaine in 225 North Duncan Street, a vacant house used as a stash house by the STANLEY HALL organization.

15. On or about October 3, 1996, JOVAN POWELL possessed 33 bags of cocaine hydrochloride and approximately $638.00 in U.S. currency while standing in the doorway of 229 North Duncan Street, a stash house utilized by the STANLEY HALL organization.

16. On or about November 7, 1996, JOVAN POWELL possessed approximately $529.00 in U.S. currency while inside 216 North Duncan Street, a stash house utilized by the STANLEY HALL organization.

17. On or about November 7, 1996, members of the conspiracy possessed approximately $1241.00 in U.S. currency, 178 bags of cocaine hydrochloride, and various items of drug paraphernalia in 216 North Duncan Street, a stash house utilized by the STANLEY HALL organization.

18. On or about November 8, 1996, JESUS HALL, a/k/a "Weedy," a/k/a Jesse Hail, ALLEN MURDOCK, a/k/a Collin Murdock, and CARLA MALLOY, a/k/a "Stinky-Woo," possessed approximately 78 grams of crack cocaine, 16 bags of crack cocaine, approximately $627.00 in U.S. currency, a cellular telephone, a digital display pager, and drug packaging materials in 229 North Duncan Street, a stash house utilized by the STANLEY HALL organization.

19. On or about December 4, 1996, JOVAN POWELL possessed 583 bags of crack cocaine, approximately

$120.00 in U.S. currency and a cellular phone in 213 North Duncan Street, a stash house utilized by the STANLEY HALL organization.

20. On or about December 9, 1996, two unindicted juvenile coconspirators engaged in drug transactions in the 200 bloc' of North Duncan Street.

21. On or about December 9, 1996, an unindicted juvenile coconspirator possessed 16 bags of crack cocaine in 216 North Duncan Street, a stash house utilized by the STANLEY HALL organization.

22. On or about December 9, 1996, members of the conspiracy possessed approximately $5900 in U.S. currency and a 45 caliber semi-automatic handgun in 216 North Duncan Street, a stash house utilized by the STANLEY HALL organization.

23. On or about December 27, 1996, members of the conspiracy possessed 89 bags of crack cocaine, a loaded 9mm Ruger semi-automatic pistol, and a loaded 45 caliber H&K semi-automatic pistol in 217 North Duncan Street, a stash house utilized by the STANLEY HALL organization.

24. On or about January 6, 1997, an unindicted juvenile coconspirator engaged in a drug transaction in the 200 block of North Duncan Street.

25. On or about January 6, 1997, members of the conspiracy possessed 13 bags of cocaine hydrochloride in 223 North Duncan Street.

26. On or about January 17, 1997, STANLEY HALL, a/k/a "Boonie," LEONARD COTTON, a/k/a "Cooch," CARLA MALLOY, a/k/a "Stinky-Woo," and an unindicted juvenile coconspirator possessed 91 bags of crack cocaine, approximately $978.00 in U.S. currency, and

various items of drug paraphernalia in 213 North Duncan Street, a stash house utilized by the STANLEY HALL organization.

27. On or about February 9, 1997, LAMONT THOMAS possessed approximately $6,000.00 in U.S. currency as he was exiting 1313 North Aisquith Street.

28. On or about February 22, 1997, STANLEY HALL, a/k/a "Boonie," possessed approximately $6,000.00 in U.S. currency at his residence at 2 Mallowhill Road in Baltimore, Maryland.

29. On or about February 22, 1997, MATILDA HALL and JESUS HALL, a/k/a "Weedy," a/k/a Jesse Hail, possessed drug packaging materials, various rounds of ammunition for 9mm, 38 caliber and 32 caliber weapons, and a 45 caliber H&K magazine in their residence at 847 McHenry Street.

30. On or about February 23, 1997, LAMONT THOMAS, a/k/a "Tree," possessed approximately $3100.00 in U.S. currency in his residence at 3020 Mayfield Avenue, Baltimore, Maryland.

31. On or about March 4, 1998, in the 100 block of Chester Street, approximately one block away from North Duncan Street, an unindicted juvenile coconspirator sold 1 bag of cocaine hydrochloride to an undercover police officer for $10.00 in U.S. currency.

32. On or about March 4, 1997, in the 100 block of Chester Street, approximately one block away from North Duncan Street, an unindicted juvenile coconspirator possessed approximately $437.00 in U.S. currency.

33. On or about March 6, 1997, in the 2100 block of East Fayette Street, an unindicted juvenile cocon-

spirator sold one bag of cocaine hydrochloride to an undercover police officer for $10.00 in U.S. currency.

34. On or about March 6, 1997, in the 2100 block of East Fayette Street, an unindicted juvenile coconspirator possessed approximately $68.00 in U.S. currency.

35. On or about March 11, 1997, in the 2100 block of East Fayette Street, an unindicted coconspirator sold 1 bag of cocaine hydrochloride to an undercover police officer for $10.00 in U.S. currency.

36. On or about March 11, 1997, in the 2100 block of East Fayette Street, an unindicted coconspirator possessed approximately $150.00 in U.S. currency.

37. On or about March 12, 1997, in the 2200 block of East Fayette Street, approximately one block from the intersection of Duncan and Fayette Streets, an unindicted coconspirator sold 1 bag of cocaine hydrochloride to an undercover police officer for $10.00 in U.S. currency.

38. On or about March 12, 1997, in the 2200 block of East Fayette Street, approximately one block from the intersection of North Duncan and East Fayette Streets, an unindicted coconspirator possessed approximately $30.00 in U.S. currency.

39. On or about March 14, 1997, JESUS HALL, a/k/a "Weedy," a/k/a Jesse Hail, possessed a 9mm Glock semi-automatic pistol and a 9mm Beretta semi-automatic pistol in a vehicle registered in the name of MATILDA HALL and located in the 600 block of Bentalou Street in Baltimore, Maryland.

40. On or about May 2, 1997, in the 2100 block of East Fayette Street, an unindicted coconspirator engaged in narcotics transactions with several individuals.

41. On or about May 2, 1997, in the 2100 block of East Fayette Street, an unindicted coconspirator possessed 11 bags of cocaine hydrochloride.

21 U.S.C. §846

/s/ LYNNE A. BATTAGLIA
LYNNE A. BATTAGLIA
United States Attorney

A TRUE BILL:

_____
Foreperson

_____
Date

UNITED STATES DISTRICT COURT FOR THE
DISTRICT OF MARYLAND

Criminal No. CCB-97-036

UNITED STATES OF AMERICA

v.

STANLEY HALL, JR., A/K/A BOONIE,
LAMONT THOMAS, A/K/A TREE,
MARQUETTE HALL, A/K/A BUTT NAKED,
JESUS HALL, A/K/A WEEDY, A/K/A JESSE HAIL,
LEONARD COTTON, A/K/A COOCH,
MATILDA HALL,
JOVAN POWELL,
ALLEN MURDOCK, A/K/A COLLIN MURDOCK,
CARLA MALLOY, A/K/A STINKY-WOO, A/K/A SLICK-WOO,
JAMES GIBSON, A/K/A POPS,
DARLENE GREEN, A/K/A SPRINKLES,
NICOLE BAYLOR, A/K/A NICKY,
STANLEY HALL, SR.,
AND
ROGER EVANS, DEFENDANTS

(Conspiracy to Distribute and Possess with Intent
to Distribute Cocaine Hydrochloride and
Cocaine Base; 21 U.S.C. §846)
[Filed Mar. 19, 1998]

SUPERSEDING INDICTMENT

The Grand Jury for the District of Maryland charges that:

COUNT ONE

Beginning in or about February, 1996, up to and including in or December, 1997, within the State and District of Maryland, the State of New York, and elsewhere,

STANLEY HALL, JR., A/K/A BOONIE,
LAMONT THOMAS A/K/A TREE,
MARQUETTE HALL, A/K/A BUTT NAKED,
JESUS HALL, A/K/A WEEDY, A/K/A JESSE HAIL,
LEONARD COTTON, A/K/A COOCH,
MATILDA HALL,
JOVAN POWELL,
ALLEN MURDOCK, A/K/A COLLIN MURDOCK,
CARLA MALLOY, A/K/A STINKY-WOO,
JAMES GIBSON, A/K/A POPS,
DARLENE GREEN, A/K/A SPRINKLES,
NICOLE BAYLOR, A/K/A NICKY,
STANLEY HALL, SR.,
AND
ROGER EVANS,

defendants herein, did knowingly, intentionally and unlawfully combine, conspire, confederate and agree with each other and with persons known and unknown to the Grand Jury, to knowingly, unlawfully and intentionally distribute and possess with intent to distribute a mixture or substance containing a detectable amount of cocaine hydrochloride, a Schedule II narcotic controlled substance, and a mixture or substance containing a detectable amount of cocaine base, commonly known as "crack," also a Schedule II narcotic controlled substance, all in violation of Title 21, United States Code, § 841(a)(1).

OBJECT OF THE CONSPIRACY

At all times material herein, the object of the charged defendants and other coconspirators was to obtain quantities of cocaine hydrochloride and cocaine base with the intent to distribute said substances for the purpose of making money.

METHOD AND MEANS USED TO FACILITATE THE CONSPIRACY

Among the methods and means used by the defendants and other coconspirators to carry out the object of the conspiracy were the following:

a. Certain members of the conspiracy maintained distinct roles in furthering the objectives of the conspiracy. STANLEY HALL, JR., a/k/a Boonie (hereinafter STANLEY HALL JR.), supervised the organization and provided the cocaine for distribution. LAMONT THOMAS, a/k/a Tree, LEONARD COTTON, a/k/a Cooch, and JOVAN POWELL acted as lieutenant for the organization by overseeing the day to day street level distribution of STANLEY HALL JR.'S cocaine. MARQUETTE HALL, a/k/a Butt Naked, supervised the use of juveniles in the street level distribution of STANLEY HALL JR.'s cocaine. JESUS HALL, a/k/a Weedy, a/k/a Jesse Hail, and ALLEN MURDOCK, a/k/a Collin Murdock, obtained multi-ounce quantities of cocaine from STANLEY HALL JR. for distribution in the Fayette and Duncan Street area. MATILDA HALL stashed cocaine, guns, and drug proceeds for the organization in her residence at 847 McHenry Street and acted as a conduit for information flowing between members of the organization relevant to their drug trafficking. CARLA MALLOY, a/k/a Stinky-Woo, assisted in the operation of the stash houses used by the organization and acted as

a street-level distributor of the organization's cocaine. JAMES GIBSON, a/k/a Pops, helped to maintain stash houses for the organization and transported kilogram quantities of cocaine from New York to Baltimore at the direction of STANLEY HALL JR. NICOLE BAYLOR, a/k/a Nicky, acted as a street-level distributor for the organization. DARLENE GREEN, a/k/a Sprinkles, obtained multi-ounce quantities of cocaine from the organization for distribution. STANLEY HALL, SR., allowed his house to be used to stash drug proceeds. ROGER EVANS took delivery of kilogram quantities of cocaine for the organization and delivered cocaine at the direction of STANLEY HALL, JR.

b. Members of the conspiracy used firearms and other means, including acts of violence and intimidation, to protect their cocaine, the cash proceeds derived from the street level distribution of their cocaine, and their area of drug distribution, and to insulate themselves from law enforcement.

c. Members of the conspiracy used different locations, including vacant houses, to stash and secrete their drugs, drug proceeds, firearms, and other drug paraphernalia, including, but not limited to, the following locations in Baltimore, Maryland: 1313 North Aisquith Street, 847 McHenry Street, 2432 Fait Avenue, and residences on North Duncan Street numbered 213, 216, 217, 218, 223, 225, 229, 231.

d. In order to maintain their ongoing drug operation, members of the conspiracy used cellular telephones and digital display pagers, or beepers, to maintain contact with one another.

e. Certain members of the conspiracy acted as the street distributors of STANLEY HALL JR.'S cocaine.

These individuals would be provided with packets containing up to 100 bags of cocaine. Money obtained from the sale of these packets would be collected by the lieutenants of the organization and given to STANLEY HALL, JR. The lieutenants would also resupply the street level dealers. The area of street level distribution utilized by members of this conspiracy was at or near the intersection surrounding the 2100 block of Fayette Street and the 200 block of North Duncan Street in Baltimore, Maryland. The hours of operation were twenty-four hours per day, seven days a week, and the street level distributors would work in twelve hour shifts.

f. Members of the conspiracy paid individuals to act as "lookouts" to maintain the integrity of the drug operation by warning the coconspirators distributing cocaine on the street if law enforcement officers were in the vicinity of the operation.

g. Members of the organization employed juveniles to assist in the daily operation of the conspiracy and thereby minimize law enforcement intrusion into the organization. The juvenile members of the conspiracy acted as street level distributors and "lookouts," and performed whatever other tasks were requested of them by the adult members of the conspiracy to assist in the distribution of STANLEY HALL JR.'s cocaine.

21 U.S.C. § 846

/s/ LYNNE A. BATTAGLIA
LYNNE A. BATTAGLIA
United States Attorney

A TRUE BILL:

/s/ MARY [illegible]
Foreperson

[3/18/98]
Date

Supreme Court, U.S.
FILED
FEB 19 2002
CLERK

(5)

No. 01-687

In the Supreme Court of the United States

UNITED STATES OF AMERICA, PETITIONER

v.

LEONARD COTTON, MARQUETTE HALL, LAMONT THOMAS, MATILDA HALL, JOVAN POWELL, JESUS HALL, AND STANLEY HALL, JR.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES

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QUESTION PRESENTED

Whether the omission from a federal indictment of a fact that enhances the statutory maximum sentence requires a court of appeals automatically to vacate the enhanced sentence, notwithstanding that the defendant did not object to the sentence in the district court, the government introduced overwhelming proof of the fact that supports the enhanced sentence, and the defendant had notice that the fact could be used to seek an enhanced sentence.

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BRIEF FOR THE UNITED STATES

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-35a) is reported at 261 F.3d 397.

JURISDICTION

The judgment of the court of appeals was entered on August 10, 2001. The petition for a writ of certiorari was filed on October 31, 2001, and granted on January 4, 2002. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. The Fifth Amendment to the United States Constitution provides, in relevant part:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury * * *.

2. The relevant provisions of Sections 841 and 846 of Title 21 of the United States Code (1994 & Supp. V 1999) are reproduced in the Appendix to the Petition at 36a-47a.

STATEMENT

1. In October 1997, a federal grand jury in the District of Maryland returned an indictment charging respondents and others with conspiring between February 1996 and May 1997 to distribute and to possess with the intent to distribute 5 kilograms or more of cocaine and 50 grams or more of cocaine base, in violation of 21 U.S.C. 846 and 841(a)(1). J.A. 1, 47-48. A superseding indictment returned in March 1998 extended the time period of the conspiracy to December 1997 and added five more defendants. The superseding indictment charged a conspiracy to distribute and to possess with the intent to distribute a "detectable amount" of cocaine and cocaine base, without alleging that any specific or threshold amounts of drugs were involved in the conspiracy. J.A. 58-59. At their arraignments on both indictments, respondents were informed that the maximum penalty for the conspiracy offense was life imprisonment. Gov't C.A. Br. 45.

2. The evidence at trial established that respondents operated a drug trafficking organization that distributed substantial quantities of cocaine and cocaine base (also known as crack cocaine) in Baltimore, Maryland. The organization was headed by respondent Stanley Hall, Jr. The organization purchased cocaine in kilogram quantities from a dealer in New York, manufactured it into crack cocaine, and bagged it for distribution to dealers who sold the drugs to their customers. The government's witnesses included, in addition to cooperating co-conspirators, FBI agents and Baltimore police officers, who testified about undercover

drug purchases, arrests and searches of members of the conspiracy, and searches of their residences. That testimony established that the arrests and searches resulted in the seizure of approximately 380 grams of cocaine base, as well as cocaine, drug paraphernalia, firearms, and currency. Pet. App. 3a, 6a; Gov't C.A. Br. 4-28.

The district court instructed the jury that it could find the defendants guilty if it found beyond a reasonable doubt that they conspired to distribute and possess with intent to distribute "cocaine hydrochloride *and* cocaine base," but that it "need not be concerned with the quantities." The court added that, "as long as you find that a defendant conspired to distribute or possess[] with intent to distribute *these controlled substances*, the amounts involved are not important." Supp. C.A. App. 8, 13; see Pet. App. 6a. The jury found the seven respondents guilty. Pet. App. 3a-4a.

3. The district court sentenced respondents pursuant to the graduated penalties set forth in 21 U.S.C. 841(b). As relevant here, Section 841(b)(1)(A) prescribes "a term of imprisonment which may not be * * * more than life" for drug offenses involving at least 5 kilograms of cocaine or at least 50 grams of cocaine base. Section 841(b)(1)(C), however, prescribes "a term of imprisonment of not more than 20 years" for drug offenses involving any detectable quantity of a Schedule II controlled substance, such as cocaine or cocaine base.

The presentence reports (PSRs) prepared by the United States Probation Office determined that respondents' base offense level under the Sentencing Guidelines was 38, the level applicable to offenses involving 1.5 kilograms or more of cocaine base. See Sentencing Guidelines § 2D1.1(c)(1). Respondents objected to that determination, but they did not dispute that their conspiracy offense involved at least 50 grams of cocaine base. See Pet. App. 28a (Wilkinson, C.J., concurring in part and dissenting in part) (noting that

respondents "did not argue that the conspiracy distributed less than 50 grams of cocaine base").[1]

The district court found, based on the trial testimony, that respondent Matilda Hall was responsible for at least 500 grams of cocaine base, and that the other respondents were each responsible for at least 1.5 kilograms of cocaine base. Applying the Sentencing Guidelines, the court sentenced respondents Matilda Hall and Jovan Powell to terms of 30 years' imprisonment, and the other respondents to terms of life imprisonment. Pet. App. 3a-4a.

4. On appeal, respondents argued that their sentences were invalid under this Court's intervening decision in *Apprendi* v. *New Jersey*, 530 U.S. 466 (2000), because drug quantity was not alleged in the superseding indictment or proved to the jury beyond a reasonable doubt. The court of appeals vacated respondents' sentences and remanded for resentencing to terms of not more than 20 years' imprisonment. Pet. App. 7a-16a.

Because respondents had not raised an *Apprendi* claim in the district court, the court of appeals held that the claim was reviewable under the plain-error standard. Under that standard, an appellate court may correct an error not raised below only if the error is "plain," "affect[s] substantial rights," and "seriously affect[s] the fairness, integrity or public reputation of judicial proceedings." *United States* v. *Olano*, 507 U.S. 725, 731, 732 (1993); see Fed. R. Crim. P. 52(b); see also Pet. App. 8a (citing *Olano*).

The court of appeals noted that it had previously held in *United States* v. *Promise*, 255 F.3d 150 (4th Cir. 2001) (en banc), petition for cert. pending, No. 01-6398 (docketed Sept. 20, 2001), that "because drug quantity 'must be treated as an

[1] Several respondents argued that their base offense levels should be reduced to 32, 34, or 36, but each of those levels entails responsibility for at least 50 grams of cocaine base. See U.S. Pet. Reply 4-5 n.2; see Sentencing Guidelines § 2D1.1(c)(2), (3) and (4).

element of an aggravated drug trafficking offense[]' under 21 U.S.C. § 841, the failure to charge a specific threshold drug quantity in the indictment and to submit the quantity issue to the jury constitutes plain error." Pet. App. 8a (quoting *Promise*, 255 F.3d at 156). *Promise* also concluded that the omission of drug quantity from the indictment affects a defendant's substantial rights whenever the defendant receives a term of imprisonment greater than that authorized by Section 841(b) for offenses involving any detectable quantity of the drug. The *Promise* court had not resolved, however, whether that error "'seriously affect[s] the fairness, integrity or public reputation of judicial proceedings,' so that we should exercise our discretion to recognize the error." *Ibid.* The court in this case "answer[ed] that question in the affirmative." *Ibid.*

The court of appeals, citing *Ex parte Bain*, 121 U.S. 1 (1887), and *Stirone* v. *United States*, 361 U.S. 212 (1960), held that "an indictment setting forth all the essential elements of an offense is both mandatory and jurisdictional." Pet. App. 10a. Accordingly, the court concluded that "the district court exceeded its jurisdiction in sentencing [respondents] for a crime with which they were never charged, thus depriving them of the constitutional right to 'answer' only for those crimes presented to the grand jury." *Id.* at 11a. The court also noted that in *Silber* v. *United States*, 370 U.S. 717 (1962) (per curiam), the Court reversed the defendant's conviction based on a defect in the indictment, even though the defendant had not raised the error in either the court of appeals or this Court. Pet. App. 12a-13a. "Likewise," the court stated, "*sentencing* a defendant for an unindicted crime also seriously affects the fairness, integrity or public reputation of judicial proceedings." *Id.* at 14a.

The court of appeals rejected the government's argument that the error in imposing sentences based on a fact not alleged in the indictment did not warrant reversal under the

plain-error standard because the evidence overwhelmingly established that respondents' offenses involved the 50 grams of cocaine base needed to support sentences of up to life imprisonment under 21 U.S.C. 841(b)(1)(A)(iii). The court held that the strength of the evidence was "not a relevant consideration" in determining whether to reverse a sentence based on an omission from the indictment. Pet. App. 15a. The court reasoned that "a reviewing court may not speculate about whether a grand jury would or would not have indicted a defendant for a crime with which he was never charged," and that to do so would "usurp the role of the grand jury" and "result in nothing less than a constructive amendment of the indictment, * * * which itself is reversible plain error." *Id.* at 15a, 16a.

Chief Judge Wilkinson dissented in part. See Pet. App. 23a-35a. Relying on *Johnson* v. *United States*, 520 U.S. 461, 469-470 (1997), he concluded that respondents could not satisfy the fourth, discretionary component of the plain-error test. He noted that the evidence that respondents participated in a conspiracy to distribute at least 50 grams of cocaine base was "overwhelming." Pet. App. 23a, 24a. "[I]t would constitute a manifest injustice," he explained, "to reduce [respondents'] sentences when the evidence undeniably demonstrates that they committed the greater statutory offense." *Id.* at 23a. Although the superseding indictment did not specify drug quantity, he found it "difficult to believe that [respondents] lacked notice that they faced 21 U.S.C. § 841(b)'s strictest penalties." He observed that the initial indictment alleged the threshold drug quantity and that, in light of the evidence at trial, respondents' "counsel clearly were aware that the government could seek the elevated penalties available under 21 U.S.C. § 841(b)(1)(A)." *Id.* at 28a-29a.

Finally, Chief Judge Wilkinson criticized the majority for "inappropriately replac[ing] the discretionary, case-by-case

assessment dictated by the fourth prong" of the plain-error test "with an essentially categorical approach when the error consists of an indictment defect." Pet. App. 30a. Here, he emphasized, the majority's approach undermines Congress's policy to impose more stringent punishment for more serious violators, because it equates the punishment of "the conspiracy's kingpin and its underlings." *Id.* at 34a. In addition, he observed that the majority's approach unfairly disregards the fact that the superseding indictment was fully in accordance with then-prevailing law to support the enhanced sentences imposed and that, in light of the overwhelming proof, there is no doubt that the grand jury, if asked, would have included the necessary drug-quantity allegations in the indictment. *Id.* at 29a-30a. Overturning respondents' sentences in such circumstances, he concluded, cannot be justified on plain-error review. *Ibid.*

SUMMARY OF ARGUMENT

I. In *Apprendi* v. *New Jersey*, 530 U.S. 466 (2000), this Court made clear that any fact, other than a prior conviction, that increases the penalty for a crime beyond the prescribed statutory maximum must be charged in a federal indictment, submitted to a jury, and proved beyond a reasonable doubt. In the federal drug laws, statutory maximum sentences increase when greater drug quantities are involved in the offense. Accordingly, in light of *Apprendi*, the imposition of a sentence above the otherwise-applicable statutory maximum for a drug offense is error if the enhancing fact of threshold drug quantity is not alleged in the indictment. The district court committed error in this case by imposing enhanced sentences in the absence of such an allegation. Contrary to the view of the court of appeals, however, that error does not require automatic reversal of the enhanced sentences.

This Court has made clear that most constitutional errors can be harmless, see *Neder* v. *United States*, 527 U.S. 1, 8

(1999), and that when the defendant forfeits an objection by failing to raise it in the district court, the more stringent standard of plain-error review applies, see *Johnson* v. *United States*, 520 U.S. 461, 465-467 (1997). The error in this case is not so serious as to amount to a "structural" defect that cannot be reviewed for harmlessness. And even if it were, the error does not automatically warrant reversal on plain-error review when the defendant failed to object in the district court.

A. In *Neder*, the Court held that the failure to secure a required finding from the petit jury is subject to harmless-error review, and that the error is harmless when the record makes it "clear beyond a reasonable doubt that a rational jury would have found the defendant guilty absent the error." 527 U.S. at 18. An analogous approach applies to the failure to secure a required finding from the grand jury. The grand jury affords far less powerful protection for the accused than the petit jury. The grand jury finds only probable cause, while the petit jury must find guilt beyond a reasonable doubt. The grand jury operates on majority vote, while a federal petit jury must be unanimous. The grand jury does not hear from the target and need not hear exculpatory evidence, while a petit jury hears the accused's defense. And a grand jury's refusal to indict leaves the prosecutor free to try again, while a petit jury's acquittal ends the defendant's jeopardy. Indeed, the grand jury is not even an essential component of due process applicable to the States, while the petit jury is. In light of *Neder*'s holding that harmless-error review applies to the failure to secure a required finding from the petit jury, harmless-error review must also apply to failures to secure required findings from the grand jury.

B. A reviewing court can readily apply harmless-error principles to the erroneous imposition of a sentence based on a fact not alleged in the indictment. When the record

establishes that any rational grand jury would have found the omitted fact, and the defendant had adequate notice that the fact would affect his sentence, the absence of an allegation necessary to support the enhanced sentence does not affect substantial rights, but rather is harmless error.

C. Harmless-error analysis does not usurp the role of the grand jury. The duty of the grand jury is to indict when the evidence shows probable cause to believe that the defendant committed a crime. Outside of the unique context of racial discrimination in the selection of the grand jurors, see *Vasquez* v. *Hillery*, 474 U.S. 254 (1986), normal principles of harmless-error analysis apply to the grand jury. See *United States* v. *Mechanik*, 475 U.S. 66 (1986).

Neither *Stirone* v. *United States*, 361 U.S. 212 (1960), nor *Silber* v. *United States*, 370 U.S. 717 (1962) (per curiam), requires otherwise. Those cases preceded this Court's comprehensive adoption of harmless-error analysis in *Chapman* v. *California*, 386 U.S. 18 (1967). In addition, the defendants in those cases made timely objections in the district court, the defendant in *Stirone* raised fair notice concerns, and the Court in *Silber* did not purport to articulate a universally applicable rule of reversal.

D. Even if the error of imposing an enhanced sentence in the absence of a required allegation in the indictment were considered "structural" error, it is subject to the plain-error rule when the defendant fails to object in the district court. *Johnson*, 520 U.S. at 468-469. In *Johnson*, the Court assumed that the failure to obtain a petit jury finding on an element was "structural error," but held that when the evidence on that element was overwhelming and uncontroverted, the error did not "seriously affect[] the fairness, integrity, or public reputation of judicial proceedings." 520 U.S. at 469-470. The same conclusion applies when the evidence establishes that any rational grand jury would have

found probable cause to believe the fact that was necessary to support the enhanced sentence.

E. The omission of drug quantity allegations is not jurisdictional error. The Grand Jury Clause of the Fifth Amendment accords the accused a personal constitutional right to be tried and sentenced on an indictment that alleges all essential facts. A violation of that right, however, does not impair the jurisdiction of the court. See *Lamar* v. *United States*, 240 U.S. 60, 64 (1916) (Holmes, J.). *Ex parte Bain*, 121 U.S. 1, 13 (1887), is not to the contrary. The jurisdictional language in that case dates from a era in which *only* jurisdictional errors were cognizable on habeas corpus, leading to an expansive use of that term by the Court. The language of *Ex parte Bain* is no longer an accurate description of indictment errors, as is shown by later authority.

II. The sentences in this case should be affirmed. Respondents did not object to their enhanced sentences in the district court, and therefore the plain-error standard applies. Even under the harmless-error standard, the imposition of enhanced sentences without the inclusion of threshold drug quantities in the indictment does not require reversal in this case.

In light of the nature of the conspiracy and the evidence at trial, any rational grand jury would have found that respondents' offense involved a sufficient quantity of drugs to authorize a maximum sentence of life imprisonment. And the omission of drug quantity from the superseding indictment did not deprive respondents of fair notice of the applicability of enhanced penalties. Like other defendants indicted before *Apprendi*, respondents could not have reasonably believed that their sentences for drug conspiracy would be limited to the penalties for the lowest quantity of the drug involved in the offense. In this case, respondents also had notice from the original indictment that increased

drug quantities would boost the statutory maximum sentence.

Even assuming that the error in this case affected substantial rights, it still does not warrant reversal under the plain-error standard. An error not raised below justifies reversal only when the error seriously affects the fairness, integrity, or public reputation of judicial proceedings. *Johnson*, 520 U.S. at 467. In light of the compelling evidence of drug quantity in this case, and the longstanding pre-*Apprendi* practice that prevailed in the federal courts, this case does not involve the sort of "particularly egregious error[]," *United States* v. *Young*, 470 U.S. 1, 15 (1985), that warrants plain-error relief. Indeed, it would be the refusal to apply the graduated penalties that Congress provided —effectively reducing a drug kingpin's sentence to that of a street-level dealer—that would undermine respect for judicial proceedings.

ARGUMENT

I. THE IMPOSITION OF A SENTENCE THAT EXCEEDS THE OTHERWISE-APPLICABLE STATUTORY MAXIMUM BASED ON A FACT NOT ALLEGED IN THE INDICTMENT IS SUBJECT TO HARMLESS-ERROR AND PLAIN-ERROR REVIEW

Since *Chapman* v. *California*, 386 U.S. 18 (1967), this Court has recognized that constitutional error in a criminal case does not always mandate reversal. The harmless-error standard, which applies when the defendant made a timely objection in the district court, requires an appellate court to "disregard errors that are harmless beyond a reasonable doubt," *i.e.*, errors that "do[] not affect substantial rights." *Neder* v. *United States*, 527 U.S. 1, 7 (1999); Fed. R. Crim. P. 52(a). The plain-error standard, which applies when the defendant did not object in the district court, also requires

an appellate court to disregard errors that do not affect the defendant's substantial rights; but it further requires affirmance even when they do, provided that those errors do not "seriously affect[] the fairness, integrity, or public reputation of judicial proceedings." *Johnson* v. *United States*, 520 U.S. 461, 467 (1997); see Fed. R. Crim. P. 52(b).

In this case, because respondents did not object in the district court to the imposition of a sentence in excess of the otherwise-applicable statutory maximum based on a fact not alleged in the indictment, the court of appeals applied the plain-error standard. Pet. App. 7a. The court concluded, however, that *any* sentence that exceeds the otherwise-applicable statutory maximum based on a fact not alleged in the indictment must be reversed, without regard to whether the defendant raised any objection at trial, whether a grand jury would necessarily have found the omitted fact, and whether the defendant had adequate notice that the fact would be relevant to determining the statutory maximum sentence. That conclusion is incorrect. While the sentencing court did err in this case, the type of error at issue is subject to plain-error review, and a reviewing court should affirm when it is clear that a rational grand jury, if asked, would have found the omitted fact and that the defendant had adequate notice that the fact would be at issue and could increase the sentence.

A. A Sentence That Exceeds The Otherwise-Applicable Statutory Maximum Based On A Fact Omitted From The Indictment Is Error

1. The Fifth Amendment's Grand Jury Clause states: "No person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury." U.S. Const. Amend. V. The function of the grand jury right is to provide an accused with notice of the charge against him so that he may prepare a defense; to enable assertion of the right not to be put in jeopardy a

second time for the same offense; and to assure that the charge is "founded upon reason" and not "dictated by an intimidating power or by malice and personal ill will." *Wood* v. *Georgia*, 370 U.S. 375, 390 (1962); *United States* v. *Miller*, 471 U.S. 130, 134-135 (1985); *Russell* v. *United States*, 369 U.S. 749, 764 (1962); see also *United States* v. *Mechanik*, 475 U.S. 66, 73-74 (1986) (O'Connor, J., concurring); *Berger* v. *United States*, 295 U.S. 78, 82 (1935); *Hale* v. *Henkel*, 201 U.S. 43, 59 (1906); 3 Joseph Story *Commentaries on the Constitution* § 1779 (1833) (observing that the "important public functions" of the grand jury are to provide an accused with "full notice of the charge" against him and to protect against "vindictive prosecutions, either by the government, or by political partisans, or by private enemies") (reprinted in 5 *The Founders' Constitution* 295 (Philip B. Kurland & Ralph Lerner, eds., 1987)). The Grand Jury Clause entitles an accused to an indictment that sets forth each essential element of the offense with which he is charged. See, *e.g.*, *Almendarez-Torres* v. *United States*, 523 U.S. 224, 228 (1998); *Miller*, 471 U.S. at 136.

An indictment returned by the grand jury, however, is not indispensable to a fundamentally fair criminal proceeding. The Court has held that the right to a grand jury indictment is not applicable to the States through the Fourteenth Amendment. *Hurtado* v. *California*, 110 U.S. 516 (1884). In *Hurtado*, the Court upheld the commencement of a state prosecution by an information prepared by a prosecutor, after a determination of probable cause by a magistrate. Rejecting the view that a grand jury indictment is an intrinsic feature of due process, the Court observed that the method of initiating the prosecution was "merely * * * preliminary" and "can result in no final judgment, except as the consequence of a regular judicial trial, conducted precisely as in cases of indictments." *Id.* at 538. Today, the right to grand jury indictment remains one of the few criminal

procedural protections in the Bill of Rights that have not been made applicable to the States. See *Albright* v. *Oliver*, 510 U.S. 266, 272-273 (1994); *Alexander* v. *Louisiana*, 405 U.S. 625, 633 (1972). And fewer than half of the States require grand jury indictments in all felony cases as a matter of their own constitutional or statutory law. 1 Sara Sun Beale et al., *Grand Jury Law and Practice* § 1:1, at 1-3, § 1:7, at 1-32 & n.1.1 (2d ed. 2001) (hereinafter *Grand Jury Law*).

2. In *Apprendi* v. *New Jersey*, 530 U.S. 466 (2000), this Court held, as a matter of constitutional law, that "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." *Id.* at 490. *Apprendi*, which involved a state court conviction, did "not address the indictment question separately." *Id.* at 477 n.3. The Court's holding, however, was based in substantial part on the conclusion that, under the common law and thereafter, facts that increased the punishment for a crime had to be charged in the indictment and found by the jury. See *id.* at 478-481; see also *id.* at 483 n.10 (historical evidence "point[s] to a single, consistent conclusion: The judge's role in sentencing is constrained at its outer limits by the facts alleged in the indictment and found by the jury"). *Apprendi* also noted that its holding was "foreshadowed" by the Court's statement in *Jones* v. *United States*, 526 U.S. 227 (1999), that "any fact (other than prior conviction) that increases the maximum penalty for a crime must be charged in an indictment, submitted to a jury, and proven beyond a reasonable doubt." 530 U.S. at 476 (quoting *Jones*, 526 U.S. at 243 n.6). Under the reasoning in *Apprendi*, facts that must be proved to the jury beyond a reasonable doubt to support an increase in the statutory

maximum prison sentence must also be alleged in an indictment in a federal case.[2]

3. Before *Apprendi*, the courts of appeals had uniformly concluded that threshold drug quantities that increased the statutory maximum sentence under 21 U.S.C. 841(b) were sentencing factors that did not have to be charged in an indictment or proved to a petit jury beyond a reasonable doubt. See *United States* v. *Sanchez*, 269 F.3d 1250, 1266-1267 & n.30 (11th Cir. 2001) (en banc) (discussing pre-*Apprendi* cases), petition for cert. pending, No. 01-8100 (docketed Jan. 15, 2002). After *Apprendi*, the courts of appeals have uniformly concluded that threshold drug quantities must be charged in an indictment in order to support an increase in the statutory maximum sentence under Section 841(b). See, *e.g.*, *United States* v. *Thomas*, 274 F.3d 655, 663 (2d Cir. 2001) (en banc) (citing cases from eight other circuits). That conclusion follows from the analysis in *Apprendi* and the nature of the sentencing scheme in Section 841(b).

Section 841 defines drug trafficking offenses and establishes graduated penalties depending on the presence of various aggravating facts. For example, when a defendant has been found guilty of a drug offense involving *any* detectable quantity of a Schedule II controlled substance (such as cocaine or cocaine base, see 21 U.S.C. 812), Section 841(b)(1)(C) authorizes "a term of imprisonment of not more than 20 years." If, however, a defendant's offense involves at least 500 grams of cocaine or at least 5 grams of cocaine base, he is subject to a term of imprisonment that "may not be less than 5 years and not more than 40 years." 21 U.S.C. 841(b)(1)(B)(ii) and (iii). And if his offense involves at least 5 kilograms of cocaine or at least 50 grams of cocaine base, he

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[2] No question of how *Apprendi* principles apply in a capital case, cf. *Ring* v. *Arizona*, No. 01-488 (to be argued Apr. 22, 2002), is at issue here.

is subject to a term of imprisonment that "may not be less than 10 years or more than life." 21 U.S.C. 841(b)(1)(A)(ii) and (iii). Drug quantity can therefore raise the statutory maximum sentence under Section 841. Consequently, under *Apprendi*, the amount of cocaine or cocaine base involved in a drug trafficking offense must be alleged in the indictment in order to support a sentence above 20 years' imprisonment.[3]

In this case, the superseding indictment did not allege the threshold quantity of drugs involved in the offense, and respondents did not waive the right to indictment. Although *Apprendi* was decided after the district court proceedings, it is applicable here because the case is still pending on direct review. See *Griffith* v. *Kentucky*, 479 U.S. 314 (1987). Accordingly, the imposition of sentences above 20 years' imprisonment in this case was error. The error was also "plain" after *Apprendi* within the meaning of Federal Rule of Criminal Procedure 52(b). See *Johnson*, 520 U.S. at 467-468 ("[W]here the law at the time of trial was settled and clearly contrary to the law at the time of appeal[,] it is enough that an error be 'plain' at the time of appellate consideration.").[4]

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[3] Similar quantity-based increases apply to other controlled substances, such as heroin, LSD, and methamphetamine. In addition, enhanced sentencing ranges apply to defendants with prior drug felony convictions. For example, a defendant with one prior drug felony conviction is exposed to a sentence of up to 30 years' imprisonment under 21 U.S.C. 841(b)(1)(C); of 10 years' to life imprisonment under 21 U.S.C. 841(b)(1)(B); and of 20 years' to life imprisonment under 21 U.S.C. 841(b)(1)(A). Offenses that result in bodily injury or death also receive enhanced punishment under the subparagraphs of Section 841(b).

[4] The conclusion that under *Apprendi* threshold drug quantities must be charged in a federal indictment and proved to the jury in order to support a sentence above the otherwise-applicable statutory maximum does not require a determination that drug quantity is formally an "element" of the offense under Section 841 or Section 846. Whether drug quantity is viewed as an "element," see, *e.g.*, *United States* v. *Thomas*, 274 F.3d at 663 (en banc), or as a sentencing factor subject to the constitutional constraints of *Apprendi*, see *Sanchez*, 269 F.3d at 1268 ("*Apprendi* does not affect our prior statutory construction of § 841(b) as setting forth purely sentencing factors"), the issue in this case is the same: whether the failure to allege drug quantity in the indictment requires automatic reversal of a sentence that exceeds the otherwise-applicable statutory maximum.

The error, however, does not mandate automatic reversal of respondents' sentences. Like most constitutional errors, the omission of an element or sentence-enhancing fact from an indictment does not entitle a defendant to relief when it is harmless (when the defendant's objection is preserved for appeal), or when it fails to satisfy the stringent plain-error standard (when the objection has been forfeited). Properly analyzed, the error in omitting a required allegation from an indictment does not necessarily affect substantial rights or impair the fairness, integrity, or public reputation of judicial proceedings. And, contrary to the court of appeals' position, the error is not "jurisdictional" in character, but involves the violation of a personal constitutional right.

B. The Imposition Of An Enhanced Sentence Based On A Fact Omitted From The Indictment Does Not Intrinsically "Affect Substantial Rights"

This Court has recognized that "most constitutional errors" in federal criminal prosecutions are subject to harmless-error review. *Neder* v. *United States*, 527 U.S. 1, 8 (1999). The Court explained in *Neder* that, "if the defendant had counsel and was tried by an impartial adjudicator, there is a strong presumption that any other [constitutional] errors that may have occurred are subject to harmless-error analysis." *Ibid.* (quoting *Rose* v. *Clark*, 478 U.S. 570, 579 (1986)). The omission from the indictment of a fact that increases the statutory maximum sentence does not implicate the defendant's right to counsel or the impartiality of the adjudicator. And there is no sound basis for overcoming the

"strong presumption" that the error here is therefore subject to harmless-error review. *Neder* holds that harmless-error analysis applies to a failure to obtain a petit jury finding on an offense element. The same conclusion applies to the failure to obtain a similar finding from a grand jury.

1. In *Neder*, the Court listed examples of "the very limited class of cases" that are exempt from harmless-error review:

> *Gideon* v. *Wainwright*, 372 U.S. 335 (1963) (complete denial of counsel); *Tumey* v. *Ohio*, 273 U.S. 510 (1927) (biased trial judge); *Vasquez* v. *Hillery*, 474 U.S. 254 (1986) (racial discrimination in selection of grand jury); *McKaskle* v. *Wiggins*, 465 U.S. 168 (1984) (denial of self-representation at trial); *Waller* v. *Georgia*, 467 U.S. 39 (1984) (denial of public trial); *Sullivan* v. *Louisiana*, 508 U.S. 275 (1993) (defective reasonable-doubt instruction).

Neder, 527 U.S. at 8; accord *Johnson*, 520 U.S. at 468-469. The Court explained that those "structural" errors "deprive defendants of 'basic protections' without which 'a criminal trial cannot reliably serve its function as a vehicle for determination of guilt or innocence * * * and no criminal punishment may be regarded as fundamentally fair.'" *Neder*, 527 U.S. at 8-9 (quoting *Rose*, 478 U.S. at 577-578). The errors in that small class "are so intrinsically harmful as to require automatic reversal (*i.e.*, 'affect substantial rights') without regard to their effect on the outcome." *Id.* at 7.[5]

The Court determined in *Neder* that the error at issue—the district court's failure to submit the materiality element of the offense to the petit jury—did not fall within that narrow category. The Court reasoned that, "[u]nlike such

[5] *Neder* involved a case in which the error was preserved. As the Court made clear in *Johnson*, 520 U.S. at 466-467, even if an error is found to be "structural," automatic reversal is not required on plain-error review, where the error was forfeited.

defects as the complete deprivation of counsel or trial before a biased judge, an instruction that omits an element of the offense does not *necessarily* render a criminal trial fundamentally unfair or an unreliable vehicle for determining guilt or innocence." 527 U.S. at 9. Instead, the error is harmless when it is "clear beyond a reasonable doubt that a rational jury would have found the defendant guilty absent the error." *Id.* at 15, 18 . That test is met, the Court found, when the record evidence supporting the omitted element was "so overwhelming" that the defendant had not even contested it. *Id.* at 16. While the Court recognized that the constitutional guarantee of a trial by jury serves as a protection against "oppression and tyranny," it held that "where a defendant did not, and apparently could not, bring forth facts contesting the omitted element, * * * the error [in failing to submit the element to the jury] does not fundamentally undermine the purposes of the jury trial guarantee." *Id.* at 18-19.

2. It follows from *Neder*'s holding—that the failure to obtain a petit jury finding on an element of an offense is not a structural error—that the failure to obtain a grand jury finding on an element or sentencing-enhancing fact is not a structural error either. The omission of a grand jury finding does not render a criminal prosecution "fundamentally unfair or an unreliable vehicle for determining [the degree of punishment]." *Neder*, 527 U.S. at 9. If anything, the Fifth Amendment right to a grand jury indictment is lower on the hierarchy of constitutional rights applicable in a criminal case than the Sixth Amendment right to a trial before a petit jury.

First, as noted above, the right to indictment by a grand jury, unlike the right to trial before a petit jury in a criminal case, does not apply to the States through the Fourteenth Amendment. Compare *Hurtado*, 110 U.S. at 538 (Fifth Amendment right to indictment not applicable to the States),

with *Duncan* v. *Louisiana*, 391 U.S. 145 (1968) (Sixth Amendment right to jury trial applicable to the States). It is hard to see why a right that is not constitutionally required in a state prosecution becomes so "fundamental" as to "defy analysis by 'harmless error' standards," *Neder*, 527 U.S. at 7, whenever it is infringed in a federal prosecution.

Second, the grand jury's return of a charge is only the opening act in a criminal proceeding; the main event is the trial. See *United States* v. *Williams*, 504 U.S. 36, 51 (1992) (the grand jury's "finding of an indictment is only in the nature of an enquiry or accusation, which is afterwards to be tried and determined") (quoting 4 William Blackstone, *Commentaries on the Laws of England* 300 (1769)); accord *Respublica* v. *Shaffer*, 1 Dall. 236, 237 (Pa. 1788). The grand jury is not the final arbiter of the facts. A grand jury indicts based solely on probable cause, and, absent a plea of guilty, the essential facts must be proved at trial, beyond a reasonable doubt.

This Court has held that errors at the charging stage may be rendered harmless by subsequent developments in the prosecution. In *United States* v. *Mechanik*, 475 U.S. 66 (1986), the Court concluded that the defendants were not entitled to reversal of their convictions because of an error in the grand jury proceedings. In that case, two witnesses appeared simultaneously before the grand jury, in violation of Federal Rule of Criminal Procedure 6(d). The error, the Court acknowledged, "had the theoretical potential to affect the grand jury's determination whether to indict these particular defendants for the offenses with which they were charged." 475 U.S. at 70. But the Court concluded that "the petit jury's subsequent guilty verdict means not only that there was probable cause to believe that the defendants were guilty as charged, but also that they are in fact guilty as charged beyond a reasonable doubt." *Ibid.* Accordingly, the Court held that "any error in the grand jury proceeding

connected with the charging decision was harmless beyond a reasonable doubt." *Ibid.* *Mechanik* illustrates that an error that impairs the grand jury's role does not inherently vitiate a later criminal conviction and sentence.

Third, although a function of both the grand jury and the petit jury is to protect against oppression and vindictiveness, see *Neder*, 527 U.S. at 19; *Wood*, 370 U.S. at 390, the petit jury provides stronger protection for the accused than the grand jury. The prosecutor has no obligation to present exculpatory evidence to the grand jury, and a target has no right to appear before the grand jury or to submit evidence on his own behalf. See *Williams*, 504 U.S. at 51-55. The grand jury sits only to find probable cause, while the petit jury must find guilt beyond a reasonable doubt. The grand jury decides by majority vote, while the petit jury in a federal case must be unanimous. Compare Fed. R. Crim. P. 6(a) and (f) with *United States* v. *Gaudin*, 515 U.S. 506, 510 (1995), and Fed. R. Crim. P. 31(a). And if a grand jury refuses to return an indictment, the prosecutor may try again, before the same grand jury or a different one; if a petit jury acquits the defendant, however, the Double Jeopardy Clause bars any retrial. See generally *Williams*, 504 U.S. at 47-50; *United States* v. *Calandra*, 414 U.S. 338, 342-344 (1974); *Grand Jury Law*, § 1.6, at 1-29; John Frederick Archbold, *Pleading and Evidence in Criminal Cases* 65-68 (15th ed. 1862) (describing 19th Century grand jury practice in England).[6]

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[6] Other structural protections for the defendant at the trial stage are not afforded at the grand jury stage. In contrast to the public trial right protected by the Sixth Amendment, which exists "for the benefit of the accused," *Waller* v. *Georgia*, 467 U.S. 39, 46 (1984) (internal quotation marks omitted), the grand jury hears evidence in secret. See Fed. R. Crim. P. 6(d) and (e). And the grand jury may consider categories of evidence that may not be considered by the petit jury, including evidence that has been obtained in violation of the Constitution. See *United States* v. *R. Enters., Inc.*, 498 U.S. 292, 298 (1991) ("The same rules that, in an

These consideration compel the conclusion that the failure to submit an issue of fact to the grand jury does not stand on a higher plane than the failure to submit an issue of fact to the petit jury. The Court concluded in *Neder* that such errors at the petit jury stage of a prosecution are not "so intrinsically harmful as to require automatic reversal (*i.e.*, 'affect substantial rights') without regard to their effect on the outcome." 527 U.S. at 7. The same conclusion must apply to similar errors at the grand jury stage of a prosecution.

C. An Indictment's Omission Of A Fact Required To Support The Sentence Is Harmless Error If A Rational Grand Jury Would Have Found The Fact And The Defendant Had Notice That The Fact Was At Issue

1. *Proof Of The Omitted Fact And Adequate Notice Render The Error Harmless*

A reviewing court can readily apply harmless-error principles to the imposition of a sentence that exceeds the otherwise-applicable statutory maximum based on a fact not contained in the indictment. The basic question is whether the omission of the fact from the indictment caused prejudice to the defendant. See *United States* v. *Olano*, 507 U.S. 725, 734 (1993) (In order to "affect substantial rights" for purposes of Federal Rule of Criminal Procedure 52 (a) and (b), "in most cases * * * the error must have been pre-

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adversary hearing on the merits, may increase the likelihood of accurate determinations of guilt or innocence do not necessarily advance the mission of a grand jury, whose task is to conduct an *ex parte* investigation to determine whether or not there is probable cause to prosecute a particular defendant."); see also *Calandra*, 414 U.S. at 349-355 (declining to extend Fourth Amendment exclusionary rule to grand jury proceedings); *Costello* v. *United States*, 350 U.S. 359, 361-364 (1956) (declining to extend rule against hearsay to grand jury).

judicial: It must have affected the outcome of the district court proceedings."). If the reviewing court determines, beyond a reasonable doubt, that a grand jury would have found the omitted fact, if it had been asked to do so, and that the defendant had notice that the fact was at issue and could affect his sentence, the error did not affect the defendant's substantial rights. Such a defendant would have received the same sentence if the right to a grand jury finding on the enhancing fact had been observed.

With respect to the strength of the evidence: The error in cases such as this one deprived the defendant of his right to a grand jury finding that there was probable cause to believe a particular fact—here, that a conspiracy involved a particular quantity of drugs. To determine whether a defendant was prejudiced by the absence of a grand jury determination on that fact, the relevant inquiry is "whether the record contains evidence that could rationally lead to a contrary finding." *Neder*, 527 U.S. at 19. To resolve that question, a reviewing court has an independent obligation to review the entire record, see *United States* v. *Lane*, 474 U.S. 438, 448 n.11 (1986) (harmless-error inquiry "requires a review of the entire record"); *United States* v. *Hasting*, 461 U.S. 499, 509 n.7 (1983) ("entire record" must be considered), including evidence submitted at sentencing.

Where the petit jury has found the same fact at trial beyond a reasonable doubt, or where the defendant has admitted to the fact at his guilty plea colloquy, a reviewing court can confidently conclude that the grand jury would also have found that fact under a less rigorous standard of proof. See *United States* v. *Patterson*, 241 F.3d 912, 914 (7th Cir.) ("Once the petit jury finds beyond a reasonable doubt (or, on plain error review, once the court concludes that the evidence was so strong that the petit jury was bound to find) that a particular drug and quantity was involved, we can be confident in retrospect that the grand jury (which acts under

a lower burden of persuasion) would have reached the same conclusion."), cert. denied, 122 S. Ct. 124 (2001); cf. *Mechanik*, 475 U.S. at 67 ("[T]he petit jury's verdict of guilty beyond a reasonable doubt demonstrates *a fortiori* that there was probable cause to charge the defendants with the offenses for which they were convicted."). Similarly, where evidence at sentencing sufficiently establishes the existence of the sentence-enhancing fact, and a defendant offers no basis for reaching a contrary finding, a reviewing court can confidently conclude that the grand jury would have found probable cause to believe the fact as well.

With respect to notice: The express allegations of an indictment are not the only means by which a defendant may receive notice of the facts potentially affecting his sentence. In many cases, for example, a reviewing court may conclude that an earlier indictment, a bill of particulars, or a prosecutor's statements at arraignment or another preliminary proceeding gave the defendant ample notice of the need to defend against a fact not alleged in the current indictment. Furthermore, in pre-*Apprendi* drug prosecutions such as this one, defendants and their counsel were well aware that facts such as drug quantity, although not alleged in the indictment (or submitted to the jury at trial), would be relevant at sentencing to determine the severity of the sentence. Section 841(b) itself makes clear the relevance of drug quantity to the applicable sentence. See *United States* v. *Buckland*, 277 F.3d 1173, 1182 (9th Cir. 2002) (en banc) ("Congress's intent * * * is apparent: to ramp up the punishment for controlled substance offenders based on the type and amount of illegal substance involved."). And uniform circuit law declared that drug quantity was a central issue to be determined at sentencing. See *United States* v. *Sanchez*, 269 F.3d at 1266.

This analysis of whether a defendant's substantial rights are affected by the district court's erroneous reliance at

sentencing on a fact not found by the grand jury appropriately balances "society's interest in punishing the guilty" against the constitutional guarantee of grand jury indictment in federal felony prosecutions. Cf. *Neder*, 527 U.S. at 18-19. The grand jury's function of protecting against prosecutorial overreaching and vindictiveness is not "fundamentally undermine[d]," *id.* at 19, where the grand jury finds all of the facts essential to the defendant's conviction and sentence, with the exception of the single fact at issue, and where the reviewing court concludes that any rational grand jury also would have found that fact, if asked to do so. The grand jury's notice function also is not undermined where the reviewing court concludes that the defendant received timely notice from other sources of the need to defend against a fact omitted from the indictment.[7]

2. *Harmless-Error Review Does Not Usurp The Role Of The Grand Jury*

The court of appeals concluded that, even though a reviewing court is required by *Neder* to determine whether a petit jury would have found a fact that it erroneously was

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[7] A third purpose served by requiring an indictment—protecting the defendant's ability to "plead it in the future as a bar to subsequent prosecutions," *Miller*, 471 U.S. at 135—is not impaired in any respect by the failure of an indictment to allege a fact that enhances the sentence. The respondents in this case, for example, could not be prosecuted in the future for the drug conspiracy alleged in the indictment, even if a second indictment were to allege an enhanced quantity of drugs. The Double Jeopardy Clause protects a defendant from being punished twice for the same conspiracy. See *Rutledge* v. *United States*, 517 U.S. 292, 297-300 & n.12 (1996) (presumption against multiple punishment for the same offense applies to convictions for violations of the CCE statute, 21 U.S.C. 848, and drug trafficking conspiracy, 21 U.S.C. 846). And a single conspiracy is the same "offense," whether or not it has additional objects. See *Braverman* v. *United States*, 317 U.S. 49, 54 (1942) ("The conspiracy is the crime, and that is one, however diverse its objects.") (internal quotation marks omitted).

not asked to consider, a reviewing court cannot determine whether a grand jury would have done so. The court of appeals reasoned that "speculat[ing] about whether a grand jury would or would not have indicted a defendant for a crime with which he was never charged * * * would usurp the role of the grand jury, which * * * is 'not bound to indict in every case where a conviction can be obtained.'" Pet. App. 15a (quoting *Vasquez* v. *Hillery*, 474 U.S. 254, 263 (1986) and *United States* v. *Ciambrone*, 601 F.2d 616, 629 (2d Cir. 1979) (Friendly, J., dissenting)). There is no basis in history or this Court's decisions to distinguish the grand jury from the petit jury in this regard.

a. *The historical evidence.* Just as the role of the petit jury is to conviet whenever there is proof beyond a reasonable doubt that the defendant committed a crime, the role of the grand jury is to indict whenever there is probable cause to believe that the defendant committed a crime. The grand jury charges delivered by earlier members of this Court, sitting on circuit, reflect the understanding that a grand jury has a "duty" to indict if the evidence provides probable cause to believe that the accused committed the offense. See, *e.g.*, *Charge to Grand Jury*, 30 F. Cas. 992, 993 (C.C.D. Cal. 1872) (Field, J., in chambers) (noting the grand juror's "duty to the government, or more properly speaking, to society, to see that parties against whom there is just ground to charge the commission of crime, shall be held to answer the charge"); *Charge to Grand Jury—Neutrality Laws*, 30 F. Cas. 1021, 1023 (C.C.D. Ohio 1851) (McLean, J., in chambers) ("If it shall appear from the evidence that shall be given, that any of our citizens have violated the above law, it will be your duty to indict them."); 2 *The Documentary History of the Supreme Court of the United States, 1789-1800* 30 (Maeva Marcus, ed., 1988) (Chief Justice Jay's Charge to the Grand Jury of the Circuit Court for the District of New York, Apr. 12, 1790) ("In a word Gentlemen

your Province and your Duty extend (as it has been before observed) to the Inquiry and Presentment of all offenses of every kind committed against the United States in this District or on the high Seas by Persons in it.").[8]

Today, as well, the model grand jury charge approved by the Judicial Conference of the United States does not contemplate that grand jurors exercise unfettered discretion in determining whether to indict. Rather, the model charge directs grand jurors that "you should vote to indict where the evidence presented to you is sufficiently strong to warrant a reasonable person's believing that the accused is probably guilty," and cautions grand jurors not to "judge the wisdom of the criminal laws enacted by Congress" or to "be concerned about punishment in the event of conviction." *Grand Jury Law* § 4:5, at 4-14 to 4-15, 4-17.

The oath taken by grand jurors similarly requires decisions based on the evidence, not personal predilection. As this Court has noted, "in this country as in England of old the grand jury has * * * pledged to indict no one because of prejudice and to free no one because of special favor." *Costello* v. *United States*, 350 U.S. 359, 362 (1956). The oath traditionally administered to grand jurors directs that "you shall present no one for envy, hatred, or malice; *neither shall you leave any one unpresented for fear, favor or affection, hope of reward or gain*, but shall present all things truly as they come to your knowledge, according to the best of your understanding." George J. Edwards, *The Grand Jury* 96-97

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[8] See also, *e.g.*, *Charge to Grand Jury—Neutrality Laws and Treason*, 30 F. Cas. 1024, 1026 (C.C.D. Mass. 1851) (Curtis, J., in chambers); 3 *The Documentary History of the Supreme Court of the United States, 1789-1800* 292-293 (Maeva Marcus, ed., 1990) (Justice Patterson's Charge to the Grand Jury of the Circuit Court for the District of Vermont, Oct. 3, 1798); 2 *The Documentary History of the Supreme Court of the United States, 1789-1800* 171 (Justice Wilson's Charge to the Grand Jury of the Circuit Court for the District of Virginia, May 23, 1791).

(1906) (emphasis added); accord *Grand Jury Law* § 4:4, at 4-13 (quoting substantially similar oath currently administered to federal grand jurors); 2 Joseph Gabbett, *The Criminal Law* 269 n.(a) (1843).

This Court's decisions have consistently described the role of the grand jury as protecting the "innocent" against improperly motivated accusations, not as protecting those persons who, although sympathetic personally or politically, are probably guilty. See, *e.g.*, *Williams*, 504 U.S. at 51; *United States* v. *Dionisio*, 410 U.S. 1, 16 (1973); *Wood*, 370 U.S. at 384. That appears to have been the original understanding of the Grand Jury Clause as well. At the ratifying convention in Massachusetts—which was one of three States to propose a constitutional amendment providing a right to grand jury indictment—a delegate argued that such a right was necessary to prevent "the most innocent person in the commonwealth" from being "dragged from his home [and] his friends" and subjected to "long, tedious, and painful imprisonment" before his ultimate acquittal at trial. 5 *The Founders' Constitution* 260 (statement of Abraham Holmes).

It has, of course, long been understood that a grand jury occasionally will not indict even when probable cause is established, just as a petit jury occasionally will not convict where guilt beyond a reasonable doubt is conclusively shown. But that does not mean that such nullification, by either the grand jury or the petit jury, is a right that courts must encourage, as distinguished from a power that courts must tolerate for reasons of public policy. See, *e.g.*, *United States* v. *Washington*, 705 F.2d 489, 494 (D.C. Cir. 1983) (per curiam opinion of panel including Ginsburg, J.) ("A jury has no more '*right*' to find a 'guilty' defendant 'not guilty' than it has to find a 'not guilty' defendant 'guilty,' and the fact that the former cannot be corrected by a court, while the latter can be, does not create a right out of the power to misapply the law."); *United States* v. *Thomas*, 116 F.3d 606, 615 (2d

Cir. 1997) ("[T]he power of juries to 'nullify' or exercise a power of lenity is just that—a power; it is by no means a right or something that a judge should encourage or permit if it is within his authority to prevent."). The power of a petit jury to nullify despite the evidence does not preclude harmless-error analysis, as *Neder* makes clear. See *United States* v. *Kerley*, 838 F.2d 932, 938 (7th Cir. 1988) (Posner, J.) ("[A jury] has the *power* to acquit on bad grounds, because the government is not allowed to appeal from an acquittal by a jury. But jury nullification is just a power, not also a right, as is shown among other things by the fact * * * that a trial error which favors the prosecution is harmless if no *reasonable* jury would have acquitted, though an actual jury might have done so."). Likewise, the power of a grand jury to refuse to return an indictment despite facts establishing probable cause does not preclude a court from reviewing for harmless error—and concluding that an error was harmless because any rational grand jury would have found probable cause to believe a particular fact, if asked to do so.

b. *This Court's jurisprudence.* This Court's decision in *Vasquez* v. *Hillery*, 474 U.S. at 263, on which the court of appeals relied (Pet. App. 15a), does not hold that a court can never conduct harmless-error review by asking whether a grand jury would have found a particular fact.

In *Hillery*, the Court held that purposeful racial discrimination in the selection of the grand jury cannot be harmless error. In the course of explaining that holding, the Court stated that the grand jury "does not determine only that probable cause exists to believe that a defendant committed a crime, or that it does not." 474 U.S. at 263. Rather, the Court stated, the grand jury has the power to select "a greater offense or a lesser offense." *Ibid.* "Moreover," the Court continued, "[t]he grand jury is not bound to indict in every case where a conviction can be obtained." *Ibid.* (quoting *Ciambrone*, 601 F.2d at 629 (dissenting opinion)). Ac-

cordingly, "even if a grand jury's determination of probable cause is confirmed in hindsight by a conviction on the indicted offense, that confirmation in no way suggests that the discrimination did not impermissibly infect the framing of the indictment and, consequently, the nature or very existence of the proceedings to come." *Ibid.* That discussion does not preclude harmless-error analysis in this case.

Hillery itself intimated that the inability to determine with certainty what the grand jury would have done precludes harmless-error review *only* in cases of racial discrimination or similarly fundamental error. See 474 U.S. at 263-264 ("discrimination in the grand jury undermines the structural integrity of the criminal tribunal itself, and is not amenable to harmless-error review"). Subsequent decisions of this Court make clear that, outside the unique context of invidious discrimination in its selection, ordinary principles of harmless-error analysis apply to the grand jury. Shortly after *Hillery*, the Court explained that the result in that case was "compelled by precedent directly applicable to the special problem of racial discrimination." *Mechanik*, 475 U.S. at 71 n.1. The Court stated that *Hillery* also rested on the view that "racial discrimination in the selection of grand jurors is so pernicious, and other remedies so impractical, that the remedy of automatic reversal was necessary as a prophylactic means of deterring grand jury discrimination in the future, and that one could presume that a discriminatorily selected grand jury would treat defendants of excluded races unfairly." *Ibid.* The Court concluded that "these considerations have little force outside the context of racial discrimination in the composition of the grand jury." *Ibid.*; see *Bank of Nova Scotia* v. *United States*, 487 U.S. 250, 256-257 (1988) (distinguishing *Hillery*'s automatic reversal rule as necessitated by racial discrimination, and describing *Hillery* as one of the "isolated exceptions" to the harmless-error rule). Because the failure to include an element or sentence-enhancing fact in an indictment is not a "special problem" like racial discrimination, *Hillery* is inapposite here.

The Court's suggestion in *Hillery* that the grand jury has unfettered discretion not to indict, despite the existence of probable cause, was therefore not essential to the decision in that case. *Hillery* was independently justified by "[t]he overriding imperative to eliminate th[e] systemic flaw [of racial discrimination] in the charging process." 474 U.S. at 264. Equally important, *Hillery*'s description of the grand jury's freedom of action relied exclusively on Judge Friendly's dissenting opinion in *Ciambrone*, 601 F.2d at 629. The sources cited in that dissent, however, do not authoritatively establish that the grand jury historically enjoyed complete discretion. To the contrary, the historical evidence described above (at 26-28) reveals that grand jurors were expected to act in accordance with law and to indict when the evidence established probable cause.[9]

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[9] The only relevant historical source cited by Judge Friendly's dissent—which largely addressed a wholly different question involving prosecutorial misconduct before the grand jury—was a state court grand jury charge advising that "[t]he grand jury may even refuse to indict although its attention is called to a clear violation of law." 601 F.2d at 629 n.2 (quoting *Charge of John Raymond Fletcher, Associate Judge, Seventh Judicial Circuit Court of Maryland, to the Grand Jury for Calvert County on May 7, 1955*, 18 F.R.D. 211, 214 (Md. Cir. Ct. 1955)). That instruction, however, contradicts the prevailing historical practice, as discussed in the text. Judge Friendly also cited three judicial opinions: *United States* v. *Cox*, 342 F.2d 167, 189-190 (5th Cir.) (Wisdom, J., concurring specially), cert. denied, 381 U.S. 935 (1965); *In re Kittle*, 180 F. 946, 947 (S.D.N.Y. 1910); and *United States* v. *Asdrubal-Herrera*, 470 F. Supp. 939 (N.D.Ill. 1979). None cites historical materials showing that the grand jury had unfettered discretion not to indict when probable cause was found. The closest is the reference in *Asdrubal-Herrera* to an English grand jury in 1681 that returned "its now famous verdict of 'ignoramus' " after being charged in Lord Shaftesbury's case that failure to return a bill where there was probable cause would be a crime. 470 F. Supp. at 942.

3. *This Court's Cases Do Not Support A Rule of Automatic Reversal*

The court of appeals cited two other decisions of this Court—*Stirone* v. *United States*, 361 U.S. 212 (1960), and *Silber* v. *United States*, 370 U.S. 717 (1962) (per curiam)—as support for its view that the omission of an element or sentence-enhancing fact from an indictment is automatically reversible. See Pet. App. 9a-13a. Neither case requires that conclusion.

In *Stirone*, the Court held that a defendant was deprived of his Fifth Amendment right to a grand jury indictment when the government proved an element at trial in a way that departed from the way that element was alleged in the indictment. The Court declined to treat the deviation from the indictment as harmless error, reasoning that a deprivation of "the defendant's substantial right to be tried only on charges presented in an indictment returned by a grand jury * * * is far too serious to be treated as nothing more than a variance and then dismissed as harmless error." 361 U.S. at 217.

Stirone was decided before this Court's comprehensive adoption of harmless-error analysis in *Chapman* v. *California*, 386 U.S. 18 (1967). As Justice Stewart noted in his concurrence in that case, before *Chapman*, the Court had "steadfastly rejected any notion that constitutional violations might be disregarded on the ground that they were 'harmless.'" *Id.* at 42 (collecting cases). Because *Stirone* was decided in an era in which constitutional errors generally required per se reversal, that decision does not control the analysis in this case. As noted above, the Court

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The judge's charge in that case supports the view that a grand jury *cannot* refuse to indict when probable cause exists. That the grand jury there may have refused to do so anyway reveals only an unreviewable power, not a right.

recognized in *Neder* that most constitutional errors can be harmless, and it did not identify *Stirone* as belonging to the "very limited class of cases" that involve an exception to that rule. See 527 U.S. at 8.

Moreover, *Stirone* presented fair notice concerns that ordinarily are not presented in cases like this one. In *Stirone*, "the charging terms (or allegations in the indictment) [were] materially broadened and altered to such a significant extent as to constitute an entirely new or different theory of the case." *McCoy* v. *United States*, 266 F.3d 1245, 1253 (11th Cir. 2001). The indictment in *Stirone* charged that an extortion violated the Hobbs Act, 18 U.S.C. 1951, by obstructing commerce in sand. At trial, however, the district court, over the defendant's objection, permitted the jury to find an effect on commerce through interference with shipments of steel. 361 U.S. at 213-214. The concerns raised by the changed focus of the trial in *Stirone* are not present when an indictment omits a fact that is intrinsic to the charged crime and that all parties expect to be relevant to the sentence. In contrast to an indictment that is broadened by presenting a wholly new or different theory of the case, "allegations in § 846 or § 841 indictments that charge generally that a defendant conspired to possess or possessed with intent to distribute [a given drug] are not even broadened when a precise amount of [that drug] is proven at trial or at sentencing." *McCoy*, 266 F.3d at 1253-1254. Indeed, "[p]roof that supports only a precise drug quantity falls within [the defendant's] broader drug conspiracy charge and, if anything, narrows the allegations in the indictment to that amount." *Id.* at 1254.

In *Silber*, the Court exercised its power, "[i]n exceptional circumstances," to notice errors that were not raised on appeal, "if the errors are obvious, or if they otherwise seriously affect the fairness, integrity or public reputation of judicial proceedings." 370 U.S. at 718. Applying that

standard, the Court held that the indictment error in *Silber*, which was raised and decided in the district court, warranted reversal of a conviction under a supervening decision of the Court (*Russell* v. *United States*, 369 U.S. 749 (1962)), even though the defendant had not asserted the indictment error on appeal. 370 U.S. at 717-718. The Court did not hold that *all* indictment errors in violation of the Fifth Amendment necessarily require reversal under that standard. In any event, *Silber*, like *Stirone*, predates *Chapman's* articulation of harmless-error analysis.[10]

D. The Error Of Imposing An Enhanced Sentence Based On A Fact Omitted From The Indictment, When Not Raised In The District Court, May Not Warrant Relief On Plain-Error Review

Even if the error in this case were held to affect a defendant's "substantial rights," it would not automatically warrant relief. Respondents did not object in the district court, and they therefore cannot prevail without satisfying the requirements of the plain-error rule of Federal Rule of Criminal Procedure 52(b).

1. As a general rule, a federal defendant's failure to make a timely objection in district court forfeits that objection. See *Johnson*, 520 U.S. at 465 (noting "the familiar principle that a right may be forfeited in criminal as well as civil cases by the failure to make timely assertion of the right before a tribunal having jurisdiction to determine it") (internal quotation marks omitted); *United States* v. *Olano*, 507 U.S. 725, 731 (1993). Rule 52(b) provides, however, that "[p]lain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court." See *Olano*, 507 U.S. at 731 (observing that Rule 52(b) "provides a court of appeals a limited power to correct errors that were forfeited because not timely raised in district court"). This Court has explained that plain-error analysis under Rule 52(b) consists of four inquiries:

> [B]efore an appellate court can correct an error not raised [in the trial court], there must be (1) error, (2) that is plain, and (3) that affects substantial rights. If all three conditions are met, an appellate court may then exercise its discretion to notice a forfeited error, but only if (4) the error seriously affects the fairness, integrity, or public reputation of judicial proceedings.

Johnson, 520 U.S. at 466-467 (brackets, citation, and internal quotation marks omitted).

In *Johnson*, the defendant argued that, despite her failure to object at trial, she was not obligated to meet the exacting plain-error standard of Rule 52(b), because the error in her case—the failure to submit an element of the offense to the jury—was so serious as to amount to "structural" error. The Court rejected that claim, holding that *all* claimed errors in federal criminal trials, regardless of their nature or seriousness, are subject to plain-error analysis under Rule 52(b) when the defendant does not make a timely objection in the district court. 520 U.S. at 466. The Court reasoned that an exception to Rule 52(b) for serious or structural errors "would be [a] creation out of whole cloth * * * which we have no authority to make." *Ibid.*

Under *Johnson*, even a conclusion that a particular type of error is "structural," or "so serious as to defy harmless-error analysis," means only that such an error always "affects substantial rights," thus satisfying the third of the four requirements for plain-error relief. See *Johnson*, 520 U.S. at 468-

[10] In addition, *Stirone* and *Silber* involved claims that were properly preserved at trial. See *Stirone*, 361 U.S. at 217-219 (noting that defendant had objected to the introduction of the evidence that departed from the indictment's allegations, to the court's instructions allowing the jury to convict on that theory, and to the entry of judgment); *Silber*, 370 U.S. at 717 (noting that defendant raised objection in district court). The Court thus had no occasion in those cases to address the analysis that would have applied if, as in this case, the claim was never raised in the district court.

469. Under the fourth requirement, a prejudicial error (including a structural one) that would clearly be grounds for relief if it was properly preserved is not a proper ground for relief if it was not preserved, unless it also "seriously affect[s] the fairness, integrity, or public reputation of judicial proceedings." *Id.* at 469-470; see *Neder*, 527 U.S. at 34-35 & n.1 (Scalia, J., dissenting) ("It is a universally acknowledged principle of law that one who sleeps on his rights—even fundamental rights—may lose them.").

Accordingly, a violation of the Grand Jury Clause in trying or sentencing a defendant on an indictment that omits an offense element or sentence-enhancing fact is subject to the plain-error standard of Rule 52(b) if the defendant fails to raise the claim of error in the district court. Even if the error were found to affect substantial rights, therefore, a reviewing court may reverse the conviction or sentence only if the error "seriously affect[s] the fairness, integrity, or public reputation of judicial proceedings." *Johnson*, 520 U.S. at 469-470.[11]

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[11] With respect to indictment errors, Rule 12(b)(2) of the Federal Rules of Criminal Procedure states that, although "[d]efenses and objections based on defects in the indictment" "must be raised prior to trial," defenses and objections based on an indictment's "fail[ure] to show jurisdiction in the court or to charge an offense * * * shall be noticed by the court at any time during the pendency of the proceedings." Although the court of appeals cited that provision in passing (Pet. App. 13a), it did not hold that the rule relieved respondents of the need to show plain error. The court of appeals' conclusion that respondents must satisfy the plain-error standard is correct. Not only do cases such as this not involve a failure "to show jurisdiction in the court or to charge an offense," Fed. R. Crim. P. 12(b)(2), but the error does not relate to the indictment alone; rather, the error involves the imposition of a sentence above the otherwise-applicable statutory maximum based on a fact not alleged in the indictment. In any event, Rule 12(b)(2) does not excuse a defendant from having to meet the requirements of the plain-error standard of Rule 52(b) when he has not made a timely objection in the district court.

2. The Court's decision in *Johnson* illustrates the application of that approach when a defendant has been deprived of a procedural right involving the determination of facts bearing on guilt or punishment. After concluding that the record evidence "overwhelming[ly]" established the issue that had been omitted from the petit jury instructions, this Court rejected the defendant's argument that the error nonetheless "seriously affect[ed] the fairness, integrity or public reputation of judicial proceedings." 520 U.S. at 470. "Indeed," the Court said, "it would be the reversal of a conviction such as this which would have that effect." *Ibid.* The Court noted that reversal for non-prejudicial error "encourages litigants to abuse the judicial process and bestirs the public to ridicule it." *Ibid.* (quoting Roger J. Traynor, *The Riddle of Harmless Error* 50 (1970)).

A district court's imposition of a sentence based on a fact not submitted to the grand jury likewise does not inherently affect the fairness, integrity, or public reputation of judicial proceedings. The "fairness" and "integrity" of the proceedings are not called into question when the evidence of the omitted fact is overwhelming and the defendant has not presented evidence to controvert it. The absence of any fundamental unfairness is further supported when the district court, though erroneous in hindsight, proceeded entirely in accordance with then-established law. And to allow a defendant to avoid the punitive consequences of a fact that he could not plausibly contest would, as the Court noted in *Johnson*, undermine rather than enhance the public reputation of the criminal justice system. See 520 U.S. at 470. *Johnson* recognizes that petit jury errors do not warrant reversal under the plain-error standard when a reviewing court concludes that the petit jury would have found an uncontested fact, if asked. Nothing in the nature or role of the grand jury requires a different approach.

E. The Error Is Not A "Jurisdictional" Error, Immune From Harmless-Error And Plain-Error Review

While purporting to apply plain-error review, the court of appeals stated that the district court "exceeded its jurisdiction" by imposing sentences on respondents that exceeded the otherwise-applicable statutory maximum based on a fact not alleged in the superseding indictment. Pet. App. 8a-9a. The court's characterization of the error in this case as "jurisdiction[al]" is incorrect and is not supported by this Court's decisions. Imposition of an enhanced statutory sentence in the absence of an indictment charging the sentence-enhancing fact, although a constitutional error, is not an error that goes to the district court's jurisdiction.

1. All federal courts have an independent obligation to assure that subject-matter jurisdiction exists over a case at all relevant times. A lack of subject-matter jurisdiction in a district court requires the reversal of its judgment without any inquiry into prejudice. See *Ruhrgas AG* v. *Marathon Oil Co.*, 526 U.S. 574, 583-584 (1999). But the error at issue here—a discrepancy between the facts alleged in the indictment and the facts relied on at sentencing—is not analogous to a lack of subject-matter jurisdiction.

The right to a grand jury indictment is a personal right of the accused. The language of the Grand Jury Clause parallels the language of other clauses of the Fifth Amendment that define personal rights, not jurisdictional prerequisites. For example, the Double Jeopardy Clause, which immediately follows the Grand Jury Clause, states: "Nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb." U.S. Const. Amend. V. That language does not constrain the power of the courts to try a person twice for the same offense. It instead recognizes a personal right of the defendant that is subject to waiver, see *United States* v. *Broce*, 488 U.S. 563 (1989), and to principles of procedural default, see *Peretz* v. *United States*, 501 U.S.

923, 936 (1991) (stating in dicta that the absence of an objection at trial waives a double jeopardy defense). A defendant likewise may waive the right to a grand jury indictment. See Fed. R. Crim. P. 7(b) (defendant in a non-capital case may waive his right to indictment and allow the government to proceed by information); *Barkman* v. *Sanford*, 162 F.2d 592 (5th Cir.), cert. denied, 332 U.S. 816 (1947). A true absence of subject-matter jurisdiction, however, cannot be waived. *United States* v. *Griffin*, 303 U.S. 226, 229 (1938).

This Court has made clear that the failure of an indictment to allege any offense does not deprive the convicting court of jurisdiction to enter judgment. In *Lamar* v. *United States*, 240 U.S. 60, 64 (1916), the Court rejected a defendant's claim that "the court had no jurisdiction because the indictment does not charge a crime against the United States." Justice Holmes, writing for a unanimous Court, explained:

> [N]othing can be clearer than that the district court, which has jurisdiction of all crimes cognizable under the authority of the United States * * * acts equally within its jurisdiction whether it decides a man to be guilty or innocent under the criminal law, and whether its decision is right or wrong. The objection that the indictment does not charge a crime against the United States goes only to the merits of the case.

Id. at 65.

The Court reaffirmed that conclusion in *United States* v. *Williams*, 341 U.S. 58, 66 (1951), which held that a ruling "that the indictment is defective does not affect the jurisdiction of the trial court to determine the case presented by the indictment." In *Williams*, the district court dismissed an indictment that charged the defendants with perjury in a prior trial on conspiracy charges under 18 U.S.C. 241. Pointing to the court of appeals' subsequent decision that the conspiracy indictment did not state an offense under Section

241, the district court reasoned that the court that tried the conspiracy charges had "no jurisdiction." 341 U.S. at 65. This Court rejected that conclusion, holding that under 18 U.S.C. 3231, the district court had "jurisdiction of the subject matter, to wit, an alleged violation of a federal conspiracy statute," and that the court of appeals' subsequent finding that "the facts stated in the indictment do not constitute a crime" did not deprive the trial court of jurisdiction. 341 U.S. at 66, 69; see *Steel Co.* v. *Citizens for a Better Environment*, 523 U.S. 83, 89 (1998) ("[T]he absence of a valid * * * cause of action does not implicate subject-matter jurisdiction, *i.e.*, the courts' statutory or constitutional *power* to adjudicate the case.")

2. In concluding that the district court did not have "jurisdiction" to impose enhanced sentences on respondents, the court of appeals relied on *Ex parte Bain*, 121 U.S. 1 (1887). That reliance was misplaced.

In *Ex parte Bain*, the Court granted habeas corpus relief to a defendant who was tried on a narrower theory than the indictment had alleged. The Court found that, as a result of the change in the indictment, "the jurisdiction of the offence is gone, and the court has no right to proceed any further in the progress of the case for want of an indictment." 121 U.S. at 13. The indictment error, the Court concluded, thus had the character of a jurisdictional defect that justified relief on habeas corpus review. See *id.* at 14 (citing, *e.g.*, *Ex parte Lange*, 85 U.S. (18 Wall.) 163 (1873), and *Ex parte Wilson*, 114 U.S. 417 (1885)). *Ex parte Bain*'s reasoning in finding jurisdictional error, however, is inconsistent with prior decisions of this Court and has been superseded by later developments in the law. *Ex parte Bain* thus does not control the question presented in this case.[12]

[12] The specific holding of *Ex parte Bain* was overruled in *United States* v. *Miller*, 471 U.S. at 144-145, which holds that it does not violate the Grand Jury Clause to try a defendant on a narrower charge than that alleged in the indictment. The Court in *Miller* reaffirmed the different principle, also derived from *Ex parte Bain*, that a broadening of the charges beyond those alleged in the indictment does violate the Grand Jury Clause. *Id.* at 142-144. But the Court did not have any occasion to apply that principle on the facts of that case, did not characterize such an error as "jurisdictional," and did not consider whether and how principles of procedural default apply to claims of improper "broadening" of the charges.

Long before *Ex parte Bain*, this Court considered and rejected the proposition that a defective indictment that fails to allege an offense deprives the convicting court of jurisdiction to enter judgment. In *Ex parte Watkins*, 28 U.S. (3 Pet.) 193, 201 (1830), the Court, in an opinion by Chief Justice Marshall, denied habeas corpus relief to a prisoner who claimed that "the indictment charges no offence for which [he] was punishable in that court." The Court reasoned that, even if the judgment "was erroneous," that did not mean that the court lacked jurisdiction to enter it. *Id.* at 200; see *Ex parte Parks*, 93 U.S. 18 (1876) (declining to review on habeas corpus a claim that the indictment did not charge any federal offense).

The jurisdictional reasoning in *Ex parte Bain* responded to the fact that, at that time, habeas corpus relief could be granted *only* when the court that rendered judgment lacked jurisdiction. See *Schlup* v. *Delo*, 513 U.S. 298, 317 (1995) ("[T]he writ originally performed only the narrow function of testing either the jurisdiction of the sentencing court or the legality of Executive detention."); *Preiser* v. *Rodriguez*, 411 U.S. 475, 485 (1973) (Under "[t]he original view," the "relevant inquiry was confined to determining simply whether or not the committing court had been possessed of jurisdiction."). *Ex parte Bain* is one of a series of cases in which the Court expanded the notion of "jurisdictional" error to include constitutional violations, although there was no colorable claim that the court lacked subject-matter juris-

diction to adjudicate the case. See, *e.g.*, *Ex parte Wilson*, 114 U.S. at 429 (claim that offense was within class of cases requiring prosecution by indictment); *Ex parte Lange*, 85 U.S. at 176-177 (double jeopardy claim).

Ultimately, however, after a long period of expansion of the category of "jurisdictional" errors to serve this function, the Court held that its power to grant habeas corpus relief existed whenever the judgment under review involved constitutional error. See *Custis* v. *United States*, 511 U.S. 485, 494 (1994); *Waley* v. *Johnston*, 316 U.S. 101, 104-105 (1942) (per curiam); see also *Wainwright* v. *Sykes*, 433 U.S. 72, 79 (1977) (by the time of *Waley*, the Court "openly discarded the concept of jurisdiction—by then more a fiction than anything else—as a touchstone of the availability of federal habeas review"); *Vance* v. *Hedrick*, 659 F.2d 447, 449-451 (4th Cir. 1981) (summarizing the expansion of the grounds for granting habeas relief), cert. denied, 456 U.S. 978 (1982). In light of that development, the use of the term "jurisdictional error" to describe any failing other than an utter lack of power in the court to adjudicate generally has become obsolete. And the post-*Ex parte Bain* decisions of the Court in *Lamar* and *Williams* establish that an indictment's failure to charge an offense does not deprive a federal court of jurisdiction. It necessarily follows that, where an indictment alleges a complete offense but merely omits to allege a sentence-enhancing fact, a district court's error in imposing an enhanced sentence based on that fact is not jurisdictional in character.

II. THE SENTENCES IN THIS CASE SHOULD BE AFFIRMED UNDER EITHER THE HARMLESS-ERROR OR THE PLAIN-ERROR STANDARD

As noted, respondents did not object in the district court to the imposition of sentences that exceed the otherwise-applicable statutory maximum under 21 U.S.C. 841(b) based on a fact, threshold drug quantity, that was not alleged in the superseding indictment. Accordingly, since respondents raised their *Apprendi* challenge to their sentences for the first time on appeal, that challenge is properly reviewed under the plain-error standard. But whether the challenge is considered under the harmless-error standard of Rule 52(a) or the plain-error standard of Rule 52(b), the sentences should be affirmed because respondents' "substantial rights" were not affected by the district court's erroneous reliance at sentencing on a fact not alleged in the superseding indictment. And the sentences should be affirmed under the plain-error standard (even if the error did affect substantial rights) because the district court's error, while plain in light of *Apprendi*, does not "seriously affect[] the fairness, integrity, or public reputation of judicial proceedings." *Johnson*, 520 U.S. at 467.

A. The Error Did Not Affect Respondents' Substantial Rights

As explained above (at 22-25), in order to ascertain whether a defendant's substantial rights were affected by a district court's imposition of an enhanced sentence based on a fact not alleged in the indictment, a reviewing court should consider two questions: whether a rational grand jury, applying the probable-cause standard, would have found that fact, and whether the defendant had adequate notice that the fact was at issue. If the reviewing court answers both questions in the affirmative, the error did not affect the defendant's substantial rights, and the sentence should be sus-

tained, whether on harmless-error or plain-error review. Under that inquiry, the district court's error here—sentencing respondents to terms of 30 years' and life imprisonment under 21 U.S.C. 841(b)(1)(A) based on a threshold drug quantity not alleged in the indictment—could not have affected respondents' substantial rights.[13]

1. A rational grand jury would undoubtedly have found probable cause that respondents' conspiracy involved at least 50 grams of cocaine base, an amount authorizing a maximum term of life imprisonment under 21 U.S.C. 841(b)(1)(A).

At trial, the government introduced approximately 380 grams of cocaine base that had been seized from the organization's stash houses on North Duncan Street in Baltimore and from the conspirators and their residences. See Pet. App. 6a ("approximately 380 grams of cocaine base * * * *were actually seized* from the various conspirators and 'stash houses'"); see also, *e.g.*, 7 Tr. 189-196; Gov't Exh. D-15 (officers seized 80 grams of cocaine base from 229 North Duncan Street and arrested respondent Jesus Hall on the roof as he attempted to flee); 7 Tr. 215-230; Gov't Exhs. D-16A, D-16B (officers arrested respondent Jovan Powell as he came out of 213 North Duncan Street and seized 158 grams of cocaine base from the house); 11 Tr. 16-17, 26-35; Gov't Exh. D-20 (officers executed search warrant at 213 North Duncan Street, arrested respondent Stanley Hall, Jr., in front of the house and respondent Leonard Cotton as he ran up the stairs, and seized 22 grams of cocaine base from the stairs and elsewhere in the house); 16 Tr. 18-22; Gov't Exh. D-29 (officers executed search warrant at Jovan Powell's

[13] When a claim of error has been preserved in the district court, the government bears the burden of establishing that the error did not affect the defendant's substantial rights. When a claim of error has *not* been preserved, however, the defendant bears the burden of proof on that question. See *Olano*, 507 U.S. at 734.

residence and seized 51 grams of cocaine base from his sweatpants). Respondents stipulated to the quantity of cocaine base in each of the government's exhibits. 18 Tr. 151-154; Gov't Exh. 253; J.A. 23.

In addition to that evidence, the government presented the testimony of several of respondents' co-conspirators, who testified to activity in the course of the conspiracy involving large quantities of cocaine base. See Pet. App. 26a-28a (Wilkinson, C.J., concurring in part and dissenting in part) (describing some of "the most incriminating evidence regarding the quantity of cocaine base," including testimony of two conspirators that, on multiple occasions, they packaged kilogram-quantities of cocaine base and testimony of another conspirator that he sold $10,000 to $12,000 of cocaine base per week for more than a month).

As Chief Judge Wilkinson noted in dissent, "there is no question that [respondents] participated in a conspiracy to distribute more than 50 grams of cocaine base." Pet. App. 24a. Even considering *only* the 380 grams of cocaine base seized by law-enforcement officers (and not the additional amounts of cocaine base testified to by the government's witnesses at trial), any rational grand jury would necessarily have found probable cause that the conspiracy involved at least 50 grams of cocaine base, less than one-seventh the amount seized.[14]

Indeed, the grand jury found in the original indictment (filed October 3, 1997) that the conspiracy involved "five kilograms or more" of cocaine and "50 grams or more" of cocaine

[14] At sentencing, respondents challenged the determination in their PSRs that they were responsible for *1.5 kilograms or more* of cocaine base and therefore should be assigned a base offense level of 38 under the Sentencing Guidelines. They did not, however, dispute that their conspiracy involved *at least 50 grams* of cocaine base, the threshold amount that triggers a sentence of up to life imprisonment under 21 U.S.C. 841(b)(1)(A).

base. J.A. 48. The superseding indictment (filed March 19, 1998) did not repeat those allegations with respect to threshold drug quantity, alleging instead a conspiracy involving "a detectable amount" of each controlled substance. J.A. 59. But there is no reason to suppose that the grand jury meant to retract its earlier findings (which, under the prevailing view of the law, were not required in an indictment). The superseding indictment extended the duration of the conspiracy by seven months (for a total of 22 months) and added five defendants (for a total of 14 defendants). The superseding indictment alleged, for example, that the activities of the conspiracy included the street-level distribution of cocaine at an intersection in Baltimore "twenty-four hours per day, seven days a week." J.A. 62. The superseding indictment also alleged, among other things, that one defendant "transported kilogram quantities of cocaine from New York to Baltimore at the direction of Stanley Hall, Jr.," the leader of the organization; that another defendant "took delivery of kilogram quantities of cocaine for the organization"; and that three defendants "obtained multi-ounce quantities of cocaine" from the organization for distribution. J.A. 60-61. The superseding indictment alleged that the conspirators used at least 11 different residences, vacant houses, and other such locations "to stash and secrete their drugs, drug proceeds, firearms, and other drug paraphernalia." J.A. 61. It is clear from those allegations that the grand jury, if asked, would have included in the superseding indictment an allegation that the conspiracy involved at least 5 kilograms (about 11 pounds) of cocaine and at least 50 grams (less than 2 ounces) of cocaine base.

2. Respondents were on ample notice that, if they were convicted of the conspiracy offense, the quantity of drugs involved in the conspiracy would be critical to determining their sentences.

Like other defendants who were indicted before *Apprendi*, respondents were on notice that, under the prevailing practice uniformly approved by the courts of appeals, drug quantity need not be alleged in the indictment (or proved to the petit jury at trial beyond a reasonable doubt) in order to authorize an increase in the statutory maximum sentence. See pp. 15, 24 *supra*. Accordingly, respondents cannot plausibly claim to have been misled by the omission of a drug quantity allegation from the superseding indictment into believing that the government would limit its proof to establishing a quantity of drugs sufficient only to authorize a sentence under the default statutory provision (in this case, 21 U.S.C. 841(b)(1)(C)) or that their sentences would be limited to the penalty corresponding to that quantity.

In this case, moreover, respondents had specific notice from the original indictment that the grand jury had found that the conspiracy involved at least 5 kilograms of cocaine and at least 50 grams of cocaine base, either of which quantity is sufficient to authorize a maximum term of life imprisonment under 21 U.S.C. 841(b)(1)(A). The superseding indictment, while not specifying those quantities, charged respondents with participating in a multi-level conspiracy, which extended over nearly two years, included many individuals, and involved large amounts of drugs, which were sold for large amounts of money. See Pet. App. 28a-29a (Wilkinson, C.J., concurring in part and dissenting in part) (observing that it is "difficult to believe that [respondents] lacked notice that the faced [Section 841(b)'s] strictest penalties").

3. A reviewing court can therefore confidently conclude both (1) that any rational grand jury would have found that respondents' conspiracy involved at least 50 grams of cocaine base and (2) that respondents were on notice that the quantity of cocaine base involved in the offense would affect their sentences upon conviction. Consequently, respondents'

substantial rights were not affected by the absence of a grand jury determination on drug quantity in the superseding indictment.

B. The Error Did Not Seriously Affect The Fairness, Integrity, Or Public Reputation Of Judicial Proceedings

Even if this Court were to conclude that the error did affect respondents' substantial rights, the Court should not exercise its discretion to correct that error. For several reasons, the error does not "seriously affect[] the fairness, integrity, or public reputation of judicial proceedings." *Johnson*, 520 U.S. at 467.

First, as explained above, respondents would have received the same sentences if they had been accorded the right to an indictment alleging drug quantity. No serious question exists that the grand jury would have found that the conspiracy involved the requisite threshold amount of cocaine base. Cf. *Johnson*, 520 U.S. at 470.

Second, when the indictment, trial, and sentencing occurred in this case, the district court's imposition of enhanced sentences under 21 U.S.C. 841(b) without an allegation of threshold drug quantity in the indictment was consistent with long-standing practice that had been approved by every court of appeals that had considered the question. Thousands of enhanced sentences were imposed under that practice. Against that background, the imposition of enhanced sentences, although erroneous in hindsight, is not so "egregious," see *United States* v. *Young*, 470 U.S. 1, 15 (1985), as to threaten the fairness, integrity, or public reputation of judicial proceedings. See Pet. App. 29a-30a (Wilkinson, C.J., concurring in part and dissenting in part) ("It is one thing to vacate a conviction or sentence where the prosecutor failed to indict in accordance with the current state of the law. It is quite another thing to vacate a conviction or sentence based on an indictment that was entirely

proper at the time.") (quoting *United States* v. *Mojica-Baez*, 229 F.3d 292, 310 (1st Cir. 2000), cert. denied, 121 S. Ct. 2215 (2001)).

Finally, as in *Johnson*, it is reversal, rather than affirmance, of respondents' sentences that could pose such a threat. Congress designed the graduated penalties in 21 U.S.C. 841(b) to ensure that more serious drug offenders would receive more severe punishments. Congress's purpose is undermined where the kingpin of a cocaine conspiracy, such as respondent Stanley Hall, Jr., is subject to the same statutory maximum sentence as any street-level cocaine dealer, simply because the grand jury was not asked to find a fact, threshold drug quantity, that it surely would have found if asked to do so. A categorical rule that all such defendants must be resentenced under the default provision of 21 U.S.C. 841(b)(1)(C) creates an appearance of unfairness by ignoring gradations in culpability among drug offenders. And it risks bringing disrespect on the judicial system to allow the most culpable defendants to avoid the enhanced sentence that Congress deemed appropriate, no matter how overwhelming the evidence establishing threshold drug quantity or other facts triggering such a sentence. As Judge Wilkinson wrote in dissent, it would be a "miscarriage of justice" to "disregard Congress's clear intent" that "kingpins are punished more vigorously than petty dealers" when "there is no question at all that the defendants here distributed the requisite drug amounts under 21 U.S.C. § 841(b) to merit the sentences." Pet. App. 33a-35a; cf. *Johnson*, 520 U.S. at 470.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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IN THE

Supreme Court of the United States

UNITED STATES OF AMERICA,

Petitioner,

v.

LEONARD COTTON, MARQUETTE HALL, LAMONT THOMAS, MATILDA HALL, JOVAN POWELL, JESUS HALL, AND STANLEY HALL, JR.,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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QUESTION PRESENTED

Whether the court of appeals erred in vacating respondents' sentences pursuant to *Apprendi* v. *New Jersey*, 530 U.S. 466 (2000), when they were sentenced for a crime different from the crime that was charged in the indictment and found by the petit jury?

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The opinion of the court of appeals is reported at 261 F.3d 397. Pet. App. 1a-35a. The district court's judgments are unreported.

STATEMENT OF JURISDICTION

The judgment of the United States Court of Appeals for the Fourth Circuit was entered on August 10, 2001. The petition for a writ of certiorari was filed on October 31, 2001, and was granted on January 4, 2002. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Const. amend. V

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, . . . nor be deprived of life, liberty, or property, without due process of law . . . .

U.S. Const. amend. VI

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, . . . and to be informed of the nature and cause of the accusation . . . .

18 U.S.C. § 3231

> The district courts of the United States shall have original jurisdiction, exclusive of the courts of the States, of all offenses against the laws of the United States.

> Nothing in this title shall be held to take away or impair the jurisdiction of the courts of the several States under the laws thereof.

21 U.S.C. § 841

The text of this statute is reproduced in the Appendix to the Petition at 36a-46a.

Federal Rule of Criminal Procedure 52

> Rule 52. Harmless Error and Plain Error
>
> (a) Harmless Error. Any error, defect, irregularity or variance which does not affect substantial rights shall be disregarded.
>
> (b) Plain Error. Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court.

STATEMENT OF THE CASE

The issue in this case is whether a reviewing court may correct an error when a district court sentenced a defendant for an offense that was neither charged in the indictment nor presented to the petit jury because an essential element of the offense was instead supplied by the sentencing judge using an improper standard of proof. This series of mistakes denied respondents their rights under the Fifth and Sixth Amendments to have each element of an offense presented to a grand jury and found by a petit jury beyond a reasonable doubt. Petitioner admits that it was "plain error" to omit an essential fact, drug quantity, from the indictment and from the elements submitted to the petit jury for a finding, and it admits that plain error occurred when the sentencing judge used the preponderance of the evidence standard to find this element.

Petitioner nevertheless claims that this Court should ignore these fundamental errors. To do so would reduce the grand

jury to superfluity and defy the basic guarantees afforded to criminal defendants by the Constitution and protected by this Court's decisions. Petitioner's argument would require this Court to overrule its own precedent that a court cannot exceed its jurisdiction by sentencing a defendant for an offense not charged in the indictment. *Ex parte Bain*, 121 U.S. 1 (1887). Moreover, petitioner would have this Court disregard its recent holding that elements of criminal offenses must be presented to a petit jury and proven beyond a reasonable doubt. *Apprendi* v. *New Jersey*, 530 U.S. 466 (2000); see also *In re Winship*, 397 U.S. 358, 364 (1970). Finally, petitioner's argument would require this Court to hold that sentencing respondents for an offense whose elements were not properly charged in the indictment, based on a finding made by the sentencing judge under a preponderance of the evidence standard, did not affect the integrity, fairness, or public reputation of the judicial proceeding. Such a holding would be untenable when the mistakes in this case undermined the very foundation of the criminal trial. The litany of constitutional errors that flowed from the initial charging decision in this case demonstrates the foundational importance of the grand jury indictment. Petitioner's attempt to let these errors go uncorrected would eviscerate the protections embodied in the grand jury guarantee.

A. Background

The grand jury charged respondents with a conspiracy to commit a drug offense prohibited by 21 U.S.C. § 841. Section 841(a) makes it "unlawful for any person knowingly or intentionally . . . to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance." 21 U.S.C. § 841(a)(1). Section 846 sets out the offense of conspiracy and provides that "[a]ny person who attempts or conspires to commit any offense defined in this subchapter shall be subject to the same penalties as those prescribed for the offense, the commission

of which was the object of the attempt or conspiracy." *Id.* § 846.

Subsection 841(b), in turn, provides a gradation of drug amounts and penalties in controlled substance offenses and states that "any person who violates subsection (a) of this section shall be sentenced as follows." *Id.* § 841(b). The penalties begin with a term of imprisonment "which may not be less than 10 years or more than life" under § 841(b)(1)(A); the relevant part of this subsection applies to possession of 50 grams or more of cocaine base. Subsection 841(b)(1)(B) provides a penalty "which may not be less than 5 years and not more than 40 years" for 5 or more grams of cocaine base. Subsection 841(b)(1)(C) is the "catchall" provision that applies to all other violations of § 841(a) involving schedule I or II substances; it sets a term of imprisonment capped at 20 years without regard to drug quantity.

While respondents' appeal was pending, this Court decided *Apprendi* v. *New Jersey*, 530 U.S. 466 (June 26, 2000). In *Apprendi*, the Court held that, "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." *Id.* at 490. The *Apprendi* decision followed this Court's decision in *Jones* v. *United States*, 526 U.S. 227 (Mar. 24, 1999) (also decided while respondents' appeal was pending), which expressed doubt about the constitutionality of allowing penalty-enhancing findings to be determined by a judge by a preponderance of the evidence. *Id.* at 243 n.6. Since this Court's decision in *Apprendi*, most courts of appeals that have analyzed the federal drug statute have held that the quantity of drugs must be alleged in the indictment and proven to a petit jury beyond a reasonable doubt. See *United States* v. *Thomas*, 274 F.3d 655, 663 (2d Cir. 2001) (en banc) (citing cases from seven other circuits); but see *United States* v. *Bjorkman*, 270 F.3d 482, 492 (7th Cir. 2001) (stating merely

that "'a post-*Apprendi* indictment *should* specify . . . the events listed in § 841(b) on which the prosecutor relies to establish the maximum sentence'"), *petition for cert. filed*, No. 01-8356 (U.S. Jan. 25, 2002). Petitioner does not challenge either of these conclusions. See Pet. Br. 7-11.

B. The District Court Proceedings

In March 1998, a federal grand jury in the District of Maryland returned a superseding indictment charging respondents and others with a single count of conspiracy to distribute and to possess with the intent to distribute cocaine and cocaine base. The indictment did not allege the amount of drugs involved. Instead, it mentioned a "detectable amount of" the controlled substances.[1] The charge arose out of an investigation of a drug organization in Baltimore, Maryland. Authorities seized currency, weapons, drug paraphernalia, approximately 380 grams of cocaine base, and approximately 84 grams of cocaine hydrochloride during searches of several houses and the arrests of respondents. Pet. App. 6a. Prosecutors charged the respondents in the single-count indictment, which cited only 21 U.S.C. § 841(a)(1) and 21 U.S.C. § 846. J.A. 59, 62.

Respondents pleaded not guilty, and a jury trial commenced on August 31, 1998. C.A. J.A. 42. During the trial, the district court instructed the jury that "as long as you find that a defendant conspired to distribute or possess[] with intent to distribute these controlled substances, the amounts involved are not important." Supp. C.A. App. 13. On November 9, 1998, the jury acquitted one defendant but found the seven respondents guilty of a conspiracy to distribute and possess with intent to distribute the controlled substances at issue.

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[1] The indictment that had been superseded alleged that the conspiracy concerned 5 or more kilograms of cocaine and 50 or more grams of cocaine base. J.A. 47-57. The superseded indictment charged different dates for the conspiracy and included fewer defendants. *Id.* at 58-63.

C.A. J.A. 54. In accordance with the court's instructions, the jury never made any finding regarding the quantity of drugs involved.

At sentencing, the district court turned to the evidence on drug amounts. Consistent with pre-*Apprendi* practice, respondents objected to the quantities of drugs alleged. They challenged the veracity of the prosecution's witnesses and the quantity attributed to them as "reasonably foreseeable," but the judge, applying a preponderance of the evidence standard, found that more than 1.5 kilograms of cocaine base were attributable to each of six of the respondents from their participation in the conspiracy.[2] The court sentenced five respondents, Stanley Hall, Jr., Leonard Cotton, Lamont Thomas, Marquette Hall, and Jesus Hall, to a term of life imprisonment, the maximum term under 21 U.S.C. § 841(b)(1)(A). Jovan Powell received a 30-year term of imprisonment based on the same finding, and Matilda Hall received 30 years of imprisonment based on a finding, under the preponderance of the evidence standard, that she was responsible for less than 1.5 kilograms of cocaine base but more than 500 grams.[3]

Respondents filed timely notices of appeal between March 1 and March 12, 1999. C.A. J.A. 852-54, 867, 888-91. On March 3, 2000, respondent Lamont Thomas, subsequently joined by the other respondents, filed a motion for a new trial on the basis of newly discovered evidence, *id.* at 67: the Special Assistant United States Attorney on the case had

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[2] For objections, *see* C.A. J.A. 477-79 (Marquette Hall), 479-84 (Leonard Cotton), 551-57 (Lamont Thomas), 610-14, 618-26 (Matilda Hall), 680-83, 713 (Jesus Hall), 755-56 (Jovan Powell), 781-82, 788 (Stanley Hall, Jr.). For findings, *see id.* at 822-25 (Stanley Hall, Jr.), 573-74 (Lamont Thomas), 507 (Leonard Cotton), 723 (Jesus Hall), 505 (Marquette Hall); 769 (Jovan Powell).

[3] *See* C.A. J.A. 831-44, 855-87 (respondents' sentences), 667-68 (finding for Matilda Hall).

testified in a related state court proceeding that one of the prosecution's principal witnesses in the federal case had lied at trial. *Id.* at 985, 979. The district court nevertheless denied the motion for a new trial. *Id.* at 69.

C. The Court Of Appeals Decision

As relevant here, respondents appealed their convictions because their sentences were invalid under *Apprendi* v. *New Jersey*, 530 U.S. 466 (2000). *Apprendi* had been decided after their sentencing but while their appeal was pending. Petitioner conceded that there had been an *Apprendi* error because the drug quantity element had not been presented to the grand jury or found by the petit jury beyond a reasonable doubt. See *Griffith* v. *Kentucky*, 479 U.S. 314, 328 (1987) (a new rule for criminal prosecutions applies to all cases pending on direct review). Nevertheless, petitioner asserted that respondents had forfeited the argument by not raising it at trial, and the error should be reviewed under the plain-error standards of Federal Rule of Criminal Procedure 52(b). According to petitioner, the court should, under its discretionary authority, ignore the error because there was evidence that would have supported a jury determination of guilt for the offense for which respondents were sentenced but never charged.[4]

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[4] The government's position on these issues has wavered since *Apprendi*. In some post-*Apprendi* litigation, the government has argued that the facts referenced in subsection (b) (relating to quantities) of § 841 are mere sentencing factors that need not be charged in the indictment, a position it has now abandoned. *See United States* v. *Promise*, 255 F.3d 150, 182-84 (4th Cir. 2001) (en banc) (Luttig, J., concurring in judgment), *petition for cert. filed*, No. 01-6398 (U.S. Sept. 20, 2001). It is also maintaining in a separate case before this Court that "[i]f the legislature could provide for judicial fact-finding by a preponderance of the evidence of facts that increase the *maximum* punishment beyond that authorized by the jury's verdict, then . . . . [i]n federal cases, such a rule would also bypass the grand jury's role in finding probable cause." Resp. Br. at 27,

The Fourth Circuit, however, determined that the error was jurisdictional in nature. Following *Ex parte Bain*, 121 U.S. 1 (1887), and *Stirone* v. *United States*, 361 U.S. 212 (1960), the court of appeals held that a court does not have jurisdiction over an offense that is not alleged in the indictment. The district court therefore exceeded its jurisdiction when it sentenced the appellants for a crime for which they were never charged, "thus depriving them of the constitutional right to 'answer' only for those crimes presented to the grand jury." Pet. App. 11a.

The court of appeals then applied a plain-error analysis to determine whether the error should be corrected. Under plain-error review, an error must be plain, it must affect a defendant's substantial rights, and it must affect the integrity, fairness, or public reputation of the proceeding before the court may choose to correct it. Fed. R. Crim. P. 52(b); *United States* v. *Olano*, 507 U.S. 725, 736 (1993). The court followed circuit precedent in *United States* v. *Promise*, 255 F.3d 150, 160-62 (4th Cir. 2001) (en banc), *petition for cert. filed*, No. 01-6398 (U.S. Sept. 20, 2001), which held that drug quantity "must be treated as an element of an aggravated drug trafficking offense" (*i.e.*, § 841(b)(1)(A)) under 21 U.S.C. § 841, *Promise*, 255 F.3d at 156, and the failure to charge a specific threshold drug quantity in the indictment and to submit the quantity issue to the jury constituted plain error. *Id.* at 160, *cited in* Pet. App. 8a. The court of appeals in the instant case concluded that the error "affects defendants' substantial rights where, as here, the defendants are sentenced to a term of imprisonment greater than that set forth in section 841(b)(1)(C) for a conviction based on an undetermined quantity of drugs." Pet. App. 8a (citing *Promise*, 255 F.3d at 160-62).

Harris v. *United States*, No. 00-10666 (U.S. filed Feb. 22, 2002) (citation omitted).

The court of appeals "ha[d] no trouble concluding" that the error "seriously affect[ed] the fairness, integrity or public reputation of judicial proceedings." Pet. App. 14a. It explained that the lower court was acting "without jurisdiction," and pointed to the "fundamental nature of the error—namely that '[the defendant] was held accountable in a federal court for an "infamous crime" for which he was never indicted by a grand jury.'" *Id.* (alteration in *Cotton*) (citing *United States* v. *Floresca*, 38 F.3d 706, 713-14 (4th Cir. 1994) (en banc)). The court of appeals ruled that it "should exercise [its] discretion to recognize the error." *Id.* at 8a. Noting that the Supreme Court had elected to exercise its discretion to correct a forfeited error when a defendant was convicted for a crime not listed in the indictment, *Silber* v. *United States*, 370 U.S. 717 (1962) (per curiam), the court of appeals decided to notice an error "under the equally (or possibly more) egregious circumstance where a defendant is sentenced based upon a crime that was not charged in the indictment *nor even presented to the petit jury*." Pet. App. 13a.

The court of appeals rejected the argument that it should decline to recognize the error on the basis of evidence that a jury might have relied upon to make findings against the defendants. In doing so, the court stated that "the quantum of evidence is not a relevant consideration when the error stems from a defect in the indictment." Pet. App. 15a. First, regarding the absence of a finding of probable cause at the outset, the court held that "a reviewing court may not speculate about whether a grand jury would or would not have indicted a defendant for a crime with which he was never charged" because to do so would usurp the role of the grand jury. *Id.* (citing *Vasquez* v. *Hillery*, 474 U.S. 254, 263 (1986), and *Promise*, 255 F.3d at 190 (Motz, J., joined by Widener, Michael, and King, JJ.)). Second, responding to the assertion that a petit jury would have convicted defendants if

the quantity element had been presented, the court explained that:

> the government's position ignores the basic principle that the grand jury and petit jury are separate and independent. Because it is well settled that the petit jury cannot usurp the role of the grand jury, it is no less evident that we cannot place ourselves in the position of the petit jury, and then, in turn, assume the role of the grand jury. In effect, this would result in nothing less than a constructive amendment of the indictment which itself is reversible plain error.

Id. at 16a (citation omitted).

After concluding that the error would affect the "fairness, integrity or public reputation of judicial proceedings" where the grand jury's role had been usurped, Pet. App. 8a (internal quotation marks omitted), the court vacated the respondents' sentences and remanded "with instructions to sentence the appellants . . . to a term of imprisonment not to exceed 20 years." *Id.* at 16a.

SUMMARY OF ARGUMENT

The judgment of the court of appeals should be affirmed for three reasons. First, a district court's jurisdiction is limited to the offenses charged in the indictment. *Ex parte Bain*, 121 U.S. 1, 12-13 (1887); see also *United States* v. *Miller*, 471 U.S. 130, 144 (1985). In this case, the district court exceeded its jurisdiction when it sentenced respondents for an offense that was not charged in the indictment and therefore never presented to the petit jury for a finding. A jurisdictional error can be noticed by the court at any time, and it requires correction. Fed. R. Crim. P. 12(b)(2). The court of appeals properly vacated the sentences in this case, although its analysis of the error under the discretionary plain-error

standard was unnecessary because the nature of the error mandated correction.

Second, the court of appeals' judgment also should be affirmed because the errors in this case fall into a class of fatal flaws known as "structural errors" that "affect[] the framework within which the trial proceeds." *Arizona* v. *Fulminante*, 499 U.S. 279, 310 (1991). These errors "are so intrinsically harmful as to require automatic reversal." *Neder* v. *United States*, 527 U.S. 1, 7 (1999). Specifically, this Court has held that reversal is necessary when a court proceeds against a defendant for a charge that was not in the indictment, even if the error has been forfeited. *Silber* v. *United States*, 370 U.S. 717 (1962) (per curiam). In addition, application of an improper standard of proof constitutes a separate structural error under *Sullivan* v. *Louisiana*, 508 U.S. 275 (1993). Contrary to petitioner's arguments, the defects in this proceeding are unrelated to the errors in *Neder* v. *United States*, 527 U.S. 1 (1999), and *Johnson* v. *United States*, 520 U.S. 461 (1997), which involved the flawed presentation of a case to the petit jury, rather than errors in the indictment, sentencing, and standard of proof.

Third, the errors in this case warrant correction under harmless-error or plain-error review. This Court has held that proceeding against a defendant for an offense not charged in the indictment can never be harmless error. *Stirone* v. *United States*, 361 U.S. 212 (1960). Petitioner tries to avoid the result of this holding by arguing that the claim of error in this case was forfeited and is subject to plain-error review. Respondents, however, objected to drug quantity at the earliest possible moment in the proceedings—when the prosecution first sought to establish the quantity element at sentencing. Petitioner's argument that the objection was forfeited in fact supports respondents' case. It demonstrates that the charging function of the grand jury had been ignored and the critical element, upon which respondents'

punishments were to be determined, was not presented until sentencing and accordingly was decided using the wrong standard of proof.

In all events, the court of appeals' judgment should be affirmed because an increase in respondents' sentences from 20 years to life, or from 20 years to 30 years, deprived respondents of a significant liberty interest. Moreover, the integrity, fairness, and public reputation of the proceeding were seriously affected by the Fifth and Sixth Amendment violations in this case. To reach this conclusion, it is unnecessary to examine the quantity or quality of the evidence adduced at sentencing. The discretion to correct such systemic errors does not depend on a defendant's innocence or guilt. In accordance with the carefully crafted structure of our criminal process, the government's failure to present such evidence to the grand jury and obtain a separate, greater charge in an indictment warrants vacatur of respondents' sentences.

ARGUMENT

I. A SENTENCING COURT'S JURISDICTION IS LIMITED TO THE OFFENSES CHARGED IN THE INDICTMENT.

A. The Error In This Case Is Jurisdictional Because The Indictment Defines The Scope Of The District Court's Power.

An "indictment found by a grand jury [is] indispensable to the power of the court to try the petitioner for the crime with which he was charged." *Ex parte Bain*, 121 U.S. 1, 12-13 (1887). For this proposition, "[t]he *Bain* case . . . has never been disapproved." *Stirone* v. *United States*, 361 U.S. 212, 217 (1960); see also *United States* v. *Miller*, 471 U.S. 130, 144 (1985). In this case, the district court sentenced respondents for an offense that was not charged in the

indictment or tried to the petit jury. When the district court imposed a sentence that exceeded the statutory maximum of the charged offense, based on an element of another offense that was not charged, it exceeded its jurisdiction. The sentence imposed by the district court must therefore be set aside.

A formal accusation is essential for every criminal trial, and without it, the court has no jurisdiction to proceed. *Post* v. *United States*, 161 U.S. 583, 587 (1896); *Albrecht* v. *United States*, 273 U.S. 1, 7 (1927). In order to charge an offense, an indictment must allege every element of the offense. *Hamling* v. *United States*, 418 U.S 87, 117 (1974); *Russell* v. *United States*, 369 U.S. 749, 763 (1962). If the indictment fails to include an essential element or fact, the defendant cannot be convicted or sentenced for that offense. *Russell*, 369 U.S. at 771-72; *Ball* v. *United States*, 140 U.S. 118, 136 (1891). The indictment's charges may only be broadened by the grand jury itself, and if the court allows an actual or constructive amendment to the indictment, the error is reversible. *Stirone*, 361 U.S. at 215-17.

Although 18 U.S.C. § 3231 grants jurisdiction to district courts over crimes against the United States, it does not confer a grant of roving jurisdiction for the district court to convict and sentence a defendant for any crime that may be supported by the evidence. Jurisdiction over a *particular* offense is essential to the validity of a criminal prosecution and the legality of a sentence, and that jurisdiction is conferred and defined in a formal charging document. *Bain*, 121 U.S. at 13-14.

This Court's decision in *Bain* is instructive. There, the Court reversed a conviction when a defendant had been convicted and sentenced based on an indictment amended without the grand jury. *Id.* In his habeas proceeding, the defendant argued that the court had lost its jurisdiction when the indictment was amended without presentation to the grand

jury. This Court agreed, holding that "this change in the indictment deprived the court of the power of proceeding to try the petitioner and sentence him to the imprisonment provided for in the statute." *Id.* at 13. As this Court explained:

> if it be once held that changes can be made by the consent or the order of the court in the body of the indictment as presented by the grand jury, and the prisoner can be called upon to answer to the indictment as thus changed, the restriction which the Constitution places upon the power of the court, in regard to the prerequisite of an indictment, in reality no longer exists. It is of no avail, under such circumstances, to say that the court still has jurisdiction of the person and of the crime; for though it has possession of the person, and would have jurisdiction of the crime, if it were properly presented by indictment, the jurisdiction of the offence is gone, and the court has no right to proceed any further in the progress of the case for want of an indictment.

Id.

In *United States* v. *Miller*, this Court narrowed *Bain*'s holding but reasserted the principle of "the impermissibility of actual additions to the offenses alleged in an indictment." 471 U.S. at 144. The Court explained that this was "a proposition we have repeatedly reaffirmed." *Id.* "[A] conviction cannot stand if based on an offense that is different from that alleged in the grand jury's indictment." *Id.* at 142. See also *Ex parte Wilson*, 114 U.S. 417, 429 (1885) ("the District Court, in holding the petitioner to answer for such a crime, and sentencing him to such imprisonment, without indictment or presentment by a grand jury, exceeded its jurisdiction"); *Libretti* v. *United States*, 516 U.S. 29, 56 (1995) ("the law alone defines the limits of a court's power to enter a judgment . . . . [E]xtrastatutory punishments implicate the very power of a court to act") (citations omitted) (Stevens,

J., dissenting); cf. *Wong Wing* v. *United States*, 163 U.S. 228, 238 (1896) (finding that the immigration commissioner, in sentencing appellants to hard labor without a grand jury indictment, "acted without jurisdiction").

Petitioner embarks on a long digression about the evolution of habeas review in an effort to distinguish *Bain*. Whatever the history of habeas review,[5] however, *Bain*'s holding that a defendant cannot be tried for charges that were not in the indictment remains good law and has been reaffirmed by this Court decades after the changes to habeas corpus law that petitioner invokes as a basis for ignoring *Bain*. See *Miller*, 471 U.S. at 144; *Stirone*, 361 U.S. at 217. Petitioner asserts that *Bain* is among a series of old cases in which the Court invoked the phrase "jurisdictional error" to describe something other than "jurisdiction" in its current sense, which is the "[p]ower and authority of a court to hear and determine a judicial proceeding; and power to render [the] particular judgment in question." *Black's Law Dictionary* 853 (6th ed. 1990). While some cases may use the term "jurisdiction" in an obsolete sense, in *Bain* the term was used just as it is used in today's jurisprudence to denote the scope of a court's power: the *Bain* Court determined that the lower court lacked power to proceed against a defendant for a crime that was not in the indictment presented by the grand jury. Nothing has changed in this meaning of the term in *Bain*, nor in its application to the facts in this case. If the Court were to adopt petitioner's argument in this case that the district court had jurisdiction to sentence respondents for an offense that was

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[5] Petitioner's resort to this argument on habeas history to distinguish *Bain*, see Pet. Br. at 41-42, underscores the fact that *Bain* remains good law and controls this case. A case does not disappear just because the years pass. *See, e.g.*, *Carmell* v. *Texas*, 529 U.S. 513, 534 (2000) (declining the United States' suggestion to abandon part of the *Calder* v. *Bull*, 3 U.S. (3 Dall.) 386 (1789), definition of ex post facto criminal laws, in spite of its apparent disuse).

not in the indictment, it would have to overrule the *Bain* line of cases.

Petitioner's reliance on *Lamar* v. *United States*, 240 U.S. 60 (1916), and *United States* v. *Williams*, 341 U.S. 58 (1951), is misplaced, Pet. Br. at 39-40: both cases turned on statutory interpretation, and neither involved an indictment that omitted elements of a crime. In *Lamar*, a defendant claimed that he could not be convicted under a statute that prohibited impersonating an officer of the United States. 240 U.S. at 64. Accused of impersonating a Congressman, defendant proffered the legal argument that a Congressman was not an officer of the United States, and therefore the court did not have jurisdiction over the case. This Court determined that this argument went "only to the merits of the case" and not to the jurisdiction of the court. *Id.* at 65; see also *Lamar* v. *United States*, 241 U.S. 103, 116 (1916). The instant case, in contrast, is not about whether the prosecution's charge is legally flawed, but about whether a court can sentence a defendant for an offense that was never charged in the indictment.

Similarly, in *United States* v. *Williams*, 341 U.S. 58 (1951), a defendant who had been tried on several charges, including conspiracy, was later indicted for perjury committed during his trial. *Id.* at 59-60. He challenged the perjury indictment by collaterally attacking his first trial: he claimed that the conspiracy statute in his first trial did not reach his conduct, so the first district court lacked jurisdiction, and he could not have committed perjury during the conspiracy portion of his trial, which was in effect void. This Court agreed that the conspiracy statute did not reach defendant's conduct, but it disagreed that the trial court's jurisdiction was affected. *Id.* at 69. There was no allegation that elements of the offense had not been properly charged in the indictment. In contrast, the jurisdictional problem in the instant case arises because the district court attempted to proceed against respondents for a

crime whose elements were *not* in the indictment. In other words, *Lamar* and *Williams* stand for the proposition that a court does not lose jurisdiction over a case when the defendant argues that the elements charged in the indictment cannot be proved. These cases therefore do not undermine the conclusion that a district court lacks jurisdiction over a charge—even if it might be proved—when it has not been included in a grand jury indictment.[6]

B. Failure To Charge An Element Of The Crime In A Charging Document Is A Jurisdictional Defect That Cannot Be Waived.

A charging document, whether an information or an indictment, is essential to perfect the general grant of jurisdiction under 18 U.S.C. § 3231 and establish jurisdiction over a particular offense in a prosecution. *Albrecht*, 273 U.S. at 8. Even if a defendant agrees to waive a grand jury indictment, he cannot waive jurisdiction. "A person may not be punished for a crime without a formal and sufficient accusation even if he voluntarily submits to the jurisdiction of the court." *Albrecht*, 273 U.S. at 8 (stating that an invalid indictment "necessarily deprive[s] the court of jurisdiction of the proceeding in which it was made") (citing *Bain*, 121 U.S. 1). Criminal cases are not an exception to the rule that parties cannot manufacture jurisdiction. *Louisville & Nashville R.R.* v. *Mottley*, 211 U.S. 149, 152 (1908). The fact that a defendant can choose to proceed by information does not operate to confer jurisdiction on the district court beyond the

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[6] Petitioner's reliance on *Ex parte Watkins*, 28 U.S. (3 Pet.) 193 (1830), Pet. Br. at 41, is similarly unavailing. In that case, the Court held that habeas review did not allow it to inquire into potential errors in a trial court's judgments. 28 U.S. (3 Pet.) at 203. Moreover, there was no allegation that the indictments in the case omitted elements, or that the defendant was convicted of a crime other than the ones stated in the indictments. *Id.* at 201.

prosecution's charging document, be it an indictment or an information.

Neither method of initiating federal criminal charges against an individual impairs the foundational principle that "[t]he Constitution gives a criminal defendant the right to demand that a jury find him guilty of all of the elements of the crime with which he is charged." *United States* v. *Gaudin*, 515 U.S. 506, 511 (1995). Whether the prosecution elects to proceed by indictment or by information, the primacy and jurisdictional necessity of the charge—setting forth all of those elements and only those elements for which the defendant will be held to answer before the petit jury—is not affected. If, for instance, a defendant is charged by indictment or information with assault, the court cannot of its own accord convict or sentence the defendant for murder, regardless of how much evidence of murder is adduced during the trial. See *Stirone*, 361 U.S. at 217. Jurisdiction over the charge is essential; even if a defendant waives the right to a grand jury indictment, a federal district court would not thereby gain jurisdiction over any state law violation charged in an information. Furthermore, respondents in the instant case did *not* waive indictment; they entered pleas of not guilty and contested the prosecution's case from arraignment through sentencing.

Where an indictment charges an offense, as the indictment in this case charged an § 841(b)(1)(C) offense, the district court has the authority to adjudicate the merits of that charge, but it does not have the power to convict or sentence a defendant for an offense that was not actually charged in the indictment. The district court's jurisdiction was restricted to the offense whose elements were properly charged in the indictment.

C. A Sentence Above The Statutory Maximum Of The Indictment Offense Exceeds The Court's Power.

A district court must have the power to render a particular sentence in a case. *In re Bonner*, 151 U.S. 242, 257 (1894). The statutory violation charged in the indictment establishes the limits on the exercise of that power. If the statute provides for a maximum sentence of 20 years, a sentence greater than 20 years exceeds the court's power. The *Apprendi* Court, while not directly considering the indictment question, stated that the "judge's role in sentencing is constrained at its outer limits by the facts alleged in the indictment and found by the jury." *Apprendi* v. *New Jersey*, 530 U.S. 466, 483 n.10 (2000). *Apprendi* merely confirmed the time-honored rule that even "[i]f the court is authorized to impose imprisonment" for the crime on which the defendant has been indicted and convicted, if the term of imprisonment "exceeds the time prescribed by law, the judgment is void for the excess." *Bonner*, 151 U.S. at 254, 258.

In *Bonner*, this Court explained that a court, whether rendering judgment or "taking custody of the accused," must "keep[] within the limitations prescribed by the law . . . . When the court goes out of these limitations, its action, to the extent of such excess, is void." *Id.* at 257. The Court rejected the proposition advanced by the government that "if the court has authority to inflict the punishment prescribed, its action is not void, though it pursues any form or mode which may commend itself to its discretion." *Id.* at 258.[7]

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[7] *See also In re Mills*, 135 U.S. 263, 270 (1890) (vacating a sentence to imprisonment in a penitentiary because the law did not authorize such imprisonment for the term of the sentence; therefore the "court below was without jurisdiction to pass any such sentences, and the orders directing the sentences of imprisonment . . . are void."); *Ex parte Lange*, 85 U.S. (18 Wall.) 163, 177 (1873) (holding that where the court did not have the power to punish a defendant, the punishment was "void . . . because in

The grant of general subject matter jurisdiction over federal criminal offenses, see 18 U.S.C. § 3231, does not give district courts the power to sentence for crimes not alleged in the indictment, or to sentence defendants to penalties not authorized by the statute. If the district court acts outside of its power, these actions cannot stand. A sentence imposed for an offense that was not charged must be vacated. *United States* v. *Moreland*, 258 U.S. 433, 437 (1922) (holding a defendant's sentence "void because of the inclusion therein of the punishment of hard labor, he not having been presented or indicted by a grand jury"). Cf. *Hardy* v. *United States*, 691 F.2d 39, 41 (1st Cir. 1982) (holding that if a recidivism-enhanced sentence was imposed without the statutorily required information on prior convictions, it would have to be vacated because the court would have acted "without authority") (Breyer, J.).

The discretionary nature of harmless-error or plain-error review is logically incompatible with jurisdictional error. Federal Rule of Criminal Procedure 12(b)(2) states that a court "shall" notice at any time an error if the indictment "fails to show jurisdiction in the court or to charge an offense." Fed. R. Crim. P. 12(b)(2); cf. *United States* v. *Olson*, 716 F.2d 850, 853 (11th Cir. 1983) (holding that "[h]armless error cannot give the district court authority that it does not possess" and remanding for re-sentencing). As Rule 12(b)(2) makes clear, a jurisdictional defect is one that may be raised at any time and that must be corrected. See *Bender* v. *Williamsport Area Sch. Dist.*, 475 U.S. 534, 541 (1986) ("'if the record discloses that the lower court was without jurisdiction this court will notice the defect, although the parties make no contention concerning it'") (quoting

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excess of the authority of the court"), *double jeopardy holding limited by United States* v. *DiFrancesco*, 449 U.S. 117, 139 (1980); *Bigelow* v. *Forrest*, 76 U.S. (9 Wall.) 339, 351 (1869) (stating that a court "would have transcended its jurisdiction" if it had ordered forfeiture beyond that authorized by statute).

United States v. *Corrick*, 298 U.S. 435, 440 (1936)). To hold otherwise would shift the authority to make "probable cause" findings to the prosecutor, who could then make an end-run around the jurisdictional prerequisite of an indictment by bringing new and greater charges.

No amount of evidence can confer jurisdiction on a court that lacks jurisdiction. Even if a petit jury finds a defendant guilty of an offense, a finding not made in this case for § 841(b)(1)(A), a guilty verdict cannot "confer jurisdiction on the court where none existed. Neither instructions nor a petit jury verdict can satisfy after the fact the Fifth Amendment right to be tried upon charges found by a grand jury." *United States* v. *Hooker*, 841 F.2d 1225, 1232 (4th Cir. 1988). If a petit jury's verdict of guilt, or a defendant's own guilty plea, do not allow the court to overlook a jurisdictional defect; a post-trial weighing of the evidence cannot cure a jurisdictional defect. Indeed, such speculation by a court about what a grand jury might have decided if it had been presented with a charge defeats the purpose of the grand jury. See *Russell*, 369 U.S. at 770. The evidence presented to the sentencing judge in this case cannot create jurisdiction over an offense that was neither charged in the indictment nor presented to the petit jury for a finding.

In this case, the language of the indictment stated an offense under § 841(b)(1)(C) (*i.e.*, an offense involving an unspecified quantity of drugs). The sentencing court sentenced respondents for a § 841(b)(1)(A) offense (a quantity-specific offense). These are wholly separate offenses. See *Jones* v. *United States*, 526 U.S. 227, 252 (1999). Because the offense charged in the indictment limited the scope of the district court's power, when the court sentenced respondents to terms above the § 841(b)(1)(C) statutory maximum term, it exceeded its jurisdiction and the excess terms were void.

II. IMPOSING A SENTENCE THAT WAS NOT PERMITTED UNDER THE INDICTMENT IS SO INTRINSICALLY HARMFUL AS TO CONSTITUTE STRUCTURAL ERROR REQUIRING REVERSAL.

A. This Court Has Found That Indictment Errors Warrant Reversal, Regardless Of Their Forfeiture.

Assuming that the error was not jurisdictional, the inadequacy of the indictment still was reversible error. In *Silber* v. *United States*, 370 U.S. 717 (1962) (per curiam), this Court concluded that a defective indictment was reversible error, even though the defendant failed to raise the error in the court of appeals or in the Supreme Court. *Id.* at 717-18.[8] *Silber* was a short opinion, but the inference that supported its straightforward conclusion was amplified in *Stirone* v. *United States*, 361 U.S. 212 (1960), where the Court reversed a conviction that had been entered upon an indictment amended without the grand jury. *Id.* at 219. The Court explained that the Fifth Amendment grand jury guarantee has as its purpose "to limit [an accused's] jeopardy to offenses charged by a group of his fellow citizens acting independently of either prosecuting attorney or judge." *Id.* at 218. If the defendant is convicted and sentenced for an offense that was not charged in the indictment, the error "destroy[s] the defendant's substantial right to be tried only on charges presented in an indictment returned by a grand jury. Deprivation of such a basic right is far too serious to be treated as nothing more than a variance and then dismissed as harmless error." *Id.* at 217. Although *Stirone* focused on a preserved claim of error, *Silber* demonstrates that the same reasoning compels reversal even when the error was forfeited.

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[8] The error had been raised in the district court. *Silber*, 370 U.S. at 717.

Contrary to petitioner's argument, this Court did not overrule these cases in *Chapman* v. *California*, 386 U.S. 18 (1967). See Pet. Br. at 32-33. In *Chapman*, the Court ruled that *some* constitutional errors may be subject to harmless-error review, but confirmed that "there are some constitutional rights so basic to a fair trial that their infraction can never be treated as harmless error." 386 U.S. at 23. Indeed, for over a century this Court has in an unbroken line of precedent protected the grand jury right by reversing indictment errors. In *Bain*, the Court reversed a conviction obtained when an indictment was amended by the prosecutor, with the trial court's consent: "after [an] indictment [is] changed it [is] no longer the indictment of the grand jury who presented it. Any other doctrine would place the rights of the citizen, which were intended to be protected by the constitutional provision, at the mercy or control of the court or prosecuting attorney." *Ex parte Bain*, 121 U.S. 1, 13 (1887). In *Stirone*, this Court reversed a Hobbs Act conviction obtained after an indictment had been constructively amended without the grand jury. *Stirone*, 361 U.S. at 214-15. While minor indictment errors that do not expand the charges of the indictment are not construed as constructive amendments, changing the charges after the grand jury has returned an indictment does direct violence to the integrity of the criminal process. In *Russell*, the Court reversed petitioners' convictions when the indictment had omitted a key fact in the charges against them. *Russell* v. *United States*, 369 U.S. 749 (1962). The Court reaffirmed "the settled rule in federal courts," *id.* at 770, that defendants have to be tried on an indictment returned by the grand jury, and not on later charges made by the court or prosecutors.

> "[I]f it be once held that changes can be made by the consent or the order of the court in the body of the indictment as presented by the grand jury, and the prisoner can be called upon to answer to the indictment as thus changed, the restriction which the Constitution

> places upon the power of the court, in regard to the prerequisite of an indictment, in reality no longer exists."

Id. at 771 (quoting *Bain*, 121 U.S. at 13). Petitioner has presented no reason for abandoning the protection this Court has accorded to the essential and plainly stated right not to be "held to answer for . . . [an] infamous crime unless on . . . indictment of a Grand Jury." U.S. Const. amend. V.

B. The Violation Of The Right To Indictment By A Grand Jury Is A Structural Error.

Although the *Silber* Court did not use the term "structural error," its reversal of the indictment error demonstrates that defective indictments fall within a class of structural errors this Court has found to be so fundamental that they require reversal. See *Sullivan* v. *Louisiana*, 508 U.S. 275, 281-82 (1993). A structural error is a "defect affecting the framework within which the trial proceeds, rather than simply an error in the trial process itself." *Arizona* v. *Fulminante*, 499 U.S. 279, 310 (1991). Such errors "undermine[] the structural integrity of the criminal tribunal itself," *Vasquez* v. *Hillery*, 474 U.S. 254, 263-64 (1986), and deprive an accused of "basic protections." *Rose* v. *Clark*, 478 U.S. 570, 577-78 (1986). The rights violated by these errors "protect important values that are unrelated to the truth-seeking function of the trial," *id.* at 587 (Stevens, J., concurring in judgment), and their deprivation has "consequences that are necessarily unquantifiable and indeterminate." *Sullivan*, 508 U.S. at 282.

The violation of the right not to be sentenced for a crime that was not charged in ~~an indictment~~ readily satisfies these criteria. This structural safeguard serves to protect not only the individual accused but also the system of justice. Its elimination therefore vitiates the legitimating mechanism for prosecution and represents a "structural defect[] in the constitution of the trial mechanism." *Fulminante*, 499 U.S. at 309. Indeed, there can be no question that bypassing this

grand jury requirement "affect[s] the framework within which the trial proceeds," rather than being "simply an error in the trial process itself." *Id.* at 310.

The right to have a group of citizens determine the validity of charges against an accused before a criminal trial may be initiated is a fundamental protection undergirding the criminal process.

> Historically, [the grand jury] has been regarded as a primary security to the innocent against hasty, malicious and oppressive persecution; it serves the invaluable function in our society of standing between the accuser and the accused . . . to determine whether a charge is founded upon reason or was dictated by an intimidating power or by malice and personal ill will.

Wood v. *Georgia*, 370 U.S. 375, 390 (1962). See also *United States* v. *Calandra*, 414 U.S. 338, 343 (1974) ("The grand jury's historic functions survive to this day. Its responsibilities continue to include both the determination whether there is probable cause to believe a crime has been committed and the protection of citizens against unfounded criminal prosecutions"). When a sentencing judge adds an element not found by the grand jury, the results are, like those of other structural errors, "necessarily unquantifiable and indeterminate." *Sullivan*, 508 U.S. at 282.

The grand jury requirement further embodies a structural allocation of powers among the judiciary, the executive, and citizenry. The Founders chose to place the power to initiate a federal criminal proceeding with the citizens—not with the judge, not with the prosecutor. "[Twelve] ordinary citizens must agree upon an indictment before a defendant is tried on a felony charge." *Gaither* v. *United States*, 413 F.2d 1061, 1066 (D.C. Cir. 1969). The grand jury "is a constitutional fixture in its own right" that "belongs to no branch of the institutional Government, serving as a kind of buffer or referee between the Government and the people." *United*

States v. *Williams*, 504 U.S. 36, 47 (1992) (internal quotation marks omitted); see also *United States* v. *Dionisio*, 410 U.S. 1, 17 (1973) (noting the grand jury's "historic role as a protective bulwark standing solidly between the ordinary citizen and an overzealous prosecutor").

Petitioner asserts that the Court can ask itself what a "rational" grand jury would have decided, had the prosecution charged in the indictment the crime for which a defendant was sentenced. See, *e.g.*, Pet. Br. at 23-24. However, the very question would lead a court astray because the unique structural role of the grand jury means that the grand jury's decision not to charge cannot be modified by a prosecutor, a petit jury, or a judge, whatever the evidence may be:

> The content of the charge, as well as the decision to charge at all, is entirely up to the grand jury—subject to its popular veto, as it were. The grand jury's decision not to indict at all, or not to charge the facts alleged by the prosecutorial officials, is not subject to review by any other body.

Gaither, 413 F.2d at 1066 (footnote omitted). This Court has been careful to guard a grand jury's independence and refuse to allow "judicial reshaping of the grand jury institution, substantially altering the traditional relationships between the prosecutor, the constituting court, and the grand jury itself." *Williams*, 504 U.S. at 50. Neither the judge nor the prosecutor can know how the grand jury would have responded to a charge:

> In the hands of the grand jury lies the power to charge a greater offense or a lesser offense; numerous counts or a single count . . . all on the basis of the same facts. Moreover, "[the] grand jury is not bound to indict in every case where a conviction can be obtained."

Hillery, 474 U.S. at 263 (alteration in *Hillery*) (grand jury discrimination) (quoting *United States* v. *Ciambrone*, 601

F.2d 616, 629 (2d Cir. 1979) (Friendly, J., dissenting)). For this reason, "even if a grand jury's determination of probable cause is confirmed in hindsight by a conviction on the indicted offense," the later determination cannot cure the earlier error. *Id.* at 263. No court can, by judicial fiat, fulfill the grand jury's role as a buffer separating the accused from the government. When a court interferes with or ignores the central role of the grand jury as an institution and the protection it provides a person accused by the government of committing a crime, it dissolves one of the checks and balances carefully embodied in our constitutional system.

Sentencing a defendant for an offense that was not charged in the indictment or found by a jury beyond a reasonable doubt is an error that affects "the entire conduct of the trial from beginning to end" and "the framework within which the trial proceeds." *Fulminante*, 499 U.S. at 309-10. These errors are as fundamental to the structure of the trial as other errors this Court has previously declared "structural." For instance, the "violation of the guarantee of a public trial required reversal without any showing of prejudice even though the values of a public trial may be intangible and unprovable in any particular case." *Id.* at 294-95 (discussing *Waller* v. *Georgia*, 467 U.S. 39 (1984)). If a defendant was denied counsel at trial or a grand jury free of discrimination, structural error mandates reversal. *Gideon* v. *Wainwright*, 372 U.S. 335, 345 (1963); *Whitus* v. *Georgia*, 385 U.S. 545, 553 (1967). Similarly the rights to be tried by an unbiased judge, in a community that has not been exposed to publicity highly negative to the defendant, are essential, and their denial constitutes structural error. *Tumey* v. *Ohio*, 273 U.S. 510, 535 (1927); *Sheppard* v. *Maxwell*, 384 U.S. 333, 351-52 (1966). Just as with a trial by a biased judge, the sentencing of a defendant for a crime not charged in the indictment is an error of such magnitude that it "'infect[s] the entire trial process.'" *Neder* v. *United States*, 527 U.S. 1, 8 (1999). If the right to have proposed charges reviewed by a group of

citizens, who examine the evidence for probable cause and who may modify or nullify charges for any reason, does not qualify as a structural right, then the use of the "structural error" term becomes a haphazard and unprincipled label for selected errors, while other important errors in the structure of the proceeding are ignored.

The right violated in this case is basic to our criminal justice system and traces its roots back to an English tradition more than 900 years old. Sara Sun Beale et al., *Grand Jury Law and Practice* § 1:1, at 1-1 (2d ed. 2001). Though in its early form, the grand jury acted as an instrument of the Crown, by the late seventeenth century, the English grand jury had developed a critical function as a shield against royal power. Ron S. Chun, *The Right to Grand Jury Indictment*, 26 Am. Crim. L. Rev. 1457, 1459 (1989), Beale, *supra*, § 1:2, at 1-9.[9] Commentators, citing historical precedents, explained the essential functions of the grand jury:

> To preserve the Innocent from the Disgrace and Hazards which ill Men may design to bring them to, out of Malice, or through Subornation, or other sinister Ends; for so tender is the Law, of the Reputation and Life of a Man, that it will not suffer one to be sullied . . . and the other indangered by a Trial, until first the Matter and Evidence against him have been scann'd, examined, and found by a Grand Jury, upon their Oaths, against him.

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[9] Two particular grand juries in London helped to cement the idea of the grand jury as a protection against unjust prosecutions. In 1681, the King of England, who was a secret Catholic, sought indictments against two Protestants, Stephen Colledge and the Earl of Shaftesbury, for treason. Grand juries in London refused to return the indictments. Chun, *supra*, at 1460-61 & n.36; George J. Edwards, Jr., *The Grand Jury* 28-31 (AMS Press Inc. 1973) (1906). These refusals to indict symbolized the grand jury's growing role as a barrier between the accused and the accuser and inspired commentators such as Henry Care in his *English Liberties, or the Free-born Subject's Inheritance* 252 (4th ed. 1719), *see infra*.

English Liberties, or the Free-born Subject's Inheritance 252 (Henry Care ed., 4th ed. 1719).

The English brought the grand jury to the American colonies, where the institution expanded beyond the traditional grand inquest functions to take on legislative and other powers, at least partly in order to assert control over local government. Grand juries inspected the condition of the highways, reported on the use of public funds, and suggested civic reforms. Marvin E. Frankel & Gary P. Naftalis, *The Grand Jury: An Institution on Trial* 10-11 (1977); Leroy D. Clark, *The Grand Jury: The Use and Abuse of Political Power* 14-15 (1975).

In the meantime, British publications extolling the grand jury as a bulwark of rights and freedoms found their way to America and encouraged the increasingly discontented colonists in their protests against British authority.[10] Indeed, grand juries played an important role in the Revolution, even thwarting enforcement of unpopular laws and adopting patriotic resolutions denouncing the British. Beale, *supra*, § 1:3, at 1-15. Royal prosecutors were understandably disenchanted with the grand juries of America, and attempted to proceed by information. After the Revolution, each of the new states adopted indictment by grand jury as the principal method of bringing criminal charges. *Id.* § 1:4, at 1-14 to 1-15; Chun, *supra*, at 1462-64.

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[10] Care's book, *supra*, was reprinted in Boston in 1721 and in Providence in 1774. *See* 1 *Pamphlets of the American Revolution* 742-43 n.9 (Bernard Bailyn ed., 1965). In a famous incident of resistance, a grand jury twice refused to indict the publisher of the *New York Weekly Journal*, John Peter Zenger, who had criticized the royal governor and his administration in the *Journal* in the 1730s. Clark, *supra*, at 18; Chun, *supra*, at 1461. Grand jurors also refused to return indictments against leaders of the Stamp Act revolt. Chun, *supra*, at 1462; Frankel & Naftalis, *supra*, at 11.

It was against this backdrop that the Constitution and Bill of Rights were framed. The Constitution did not require separate federal inferior courts and therefore did not include a grand jury right. The judicial provisions of the Constitution were left deliberately vague in order to avoid inciting the resistance of many states, which were wary of the creation of lower federal courts. See Richard D. Younger, *The People's Panel: The Grand Jury in the United States, 1634-1941*, at 44-45 (1963). However, at several of the state ratifying conventions, delegates debated the need for a specific grand jury guarantee, arguing that without it, the new federal government would be able to file informations and imprison "the most innocent person in the commonwealth" without indictment by a grand jury. 2 *The Debates in the Several State Conventions on the Adoption of the Federal Constitution as Recommended by the General Convention at Philadelphia in 1787*, at 110 (Jonathan Elliott ed., Ayer Co. 1987) (1888) (statement of Holmes). Arguments that the new government would be one of integrity did not suffice to reassure delegates that prosecutors would not indiscriminately file informations against an individual and cause unjust "loss of his liberty, . . . loss of his time, great expenses, and perhaps cruel sufferings." *Id.* The Massachusetts convention recommended that the Constitution be amended to provide for indictment for capital offenses, and New York and New Hampshire followed suit. 1 *id.* at 323, 326, 328. At its first session, the new Congress proposed what is now the Fifth Amendment, and after ratification by the necessary number of states, it was adopted on December 15, 1791. Beale, *supra*, § 1:4, at 1-19.

The grand jury, with a pedigree older than that of many rights in the Constitution, thus occupies a central place in the American criminal justice system. The strength of the institution emerged in moments of upheaval and conflict with autocratic authority, and states demanded the grand jury in order to protect their citizens against the possible abuses of

the new federal power. For these reasons, the Fifth Amendment's guarantee of a grand jury in federal prosecutions is the cement which is integral to the foundation of the federal criminal justice system. The history and tradition of the grand jury demonstrate that it provided key support for this system, lending popular authority to the government's criminal proceedings and safeguarding the citizens against prosecutorial abuses. A violation of this grand jury right is properly deemed to constitute a "structural defect[] in the constitution of the trial mechanism." *Fulminante*, 499 U.S. at 309. To allow the errors in this case to go uncorrected would endanger an institution that has proven essential to the legitimacy of the criminal justice system.

Contrary to petitioner's arguments, the fact that the grand jury clause has not been incorporated into the Fourteenth Amendment does not diminish the effect of the error on the structure of a federal criminal proceeding. Simply because a state may not be required by the Constitution to use a grand jury does not mean that those sovereigns that do require a grand jury indictment are free to submit one crime to the grand jury and another to the petit jury, and then reserve for a sentencing judge the choice of the crime to use for sentencing. See *In re Winship*, 397 U.S. 358 (1970). State practice does not render the Fifth Amendment grand jury protections optional for federal trials. Cf. *Peters* v. *Kiff*, 407 U.S. 493, 501 (1972) (plurality) (holding that "if a State chooses, quite apart from constitutional compulsion, to use a grand or petit jury, due process imposes limitations on" the grand jury's composition). This Court has not hesitated to recognize that the grand jury system is "a central component of the criminal justice process" in reviewing a *state* court proceeding. *Campbell* v. *Louisiana*, 523 U.S. 392, 398 (1998). Petitioner does not explain why, if the grand jury process is "central" in a state court proceeding where it is not required by the Constitution, the value of the grand jury

process would diminish in a federal trial when the text of the Constitution commands the use of the grand jury.

Moreover, different jurisdictions may use different charging instruments, but regardless of their choice of instrument, a failure to initiate a criminal trial by charging the offense is a core defect that renders all subsequent proceedings void. Even in a state proceeding without a grand jury, the same illegal expansion of charges against a defendant violates due process and requires reversal. In *Cole* v. *Arkansas*, 333 U.S. 196 (1948), the state supreme court determined that defendants in a state court trial were charged in an information with violation of one subsection of an act (involving forcefully preventing workers from working during a labor dispute). *Id.* at 197-98. Since the jury was instructed on, and the evidence supported, a violation of a different section of the act (involving acting in concert to assemble near a labor dispute), this Court held that "[i]t is as much a violation of due process to send an accused to prison following conviction of a charge on which he was never tried as it would be to convict him upon a charge that was never made." *Id.* at 201.[11] The decision not only protected defendants' rights at trial, but also constrained reviewing courts by holding that they could not affirm on the basis of an offense (even a section of the same act) that was not charged in an information. *Id.* at 202; see also *Dunn* v. *United States*, 442 U.S. 100, 106 (1979) ("To uphold a conviction on a

[11] *See also State* v. *Childs*, 724 N.E.2d 781, 786 (Ohio 2000) (affirming the reversal of a conviction, following a plea of no contest, on a conspiracy count, because "[t]he state's failure to allege a specific, substantial, overt act committed in furtherance of the conspiracy . . . render[ed] the indictment invalid"); *Jefferson* v. *State*, 556 So. 2d 1016, 1019 (Miss. 1989) (stating that "the failure of the indictment to charge . . . an essential element of a criminal offense, is not waived" by a guilty plea); *Cook* v. *State*, 902 S.W.2d 471, 480 (Tex. Crim. App. 1995) (holding a conviction void because the indictment failed to charge "a person," and thus "d[id] not vest the trial court with jurisdiction").

charge that was neither alleged in an indictment nor presented to a jury at trial offends the most basic notions of due process.").

To avoid the conclusion that the error in this case was structural, petitioner relies on two inapposite case, *Neder* v. *United States*, 527 U.S. 1 (1999), and *Johnson* v. *United States*, 520 U.S. 461 (1997), to justify its proposed abandonment of this Court's precedent on the structural importance of an indictment by a grand jury. In *Neder* and *Johnson*, the Court considered errors in the presentation of the case to the petit jury and decided not to reverse because the evidence supported the juries' guilty verdicts. *Neder* applied harmless-error review, and *Johnson* applied plain-error review. Neither case had anything to do with deficiencies in an indictment; these were cases that dealt with omissions from jury instructions. The mistakes were "'simply . . . error[s] in the trial process itself.'" *Neder*, 527 U.S. at 8 (quoting *Fulminante*, 499 U.S. at 310). A mistake in the presentation of the case to the petit jury may logically be assessed in the context of the rest of the evidence presented to the jury. *Id.* at 18. A grand jury proceeding, on the other hand, "is not an adversary hearing in which the guilt or innocence of the accused is adjudicated." *Calandra*, 414 U.S. at 343. An error in a grand jury indictment allows only a "guess as to what was in the minds of the grand jury at the time they returned the indictment." *Russell*, 369 U.S. at 770.

Furthermore, the defendants in *Neder* and *Johnson* were tried "under the correct standard of proof," a fact the *Neder* Court noted as important in determining whether to notice the error. *Neder*, 527 U.S. at 9. Respondents in this case were sentenced for a crime based on an element found by a preponderance of the evidence, the wrong standard of proof. The *Neder* and *Johnson* cases also took into account pragmatic considerations that do not obtain here. The Court in those cases was concerned about reversing a conviction,

and it explained that "[r]eversal without any consideration of the effect of the error upon the verdict would send the case back for retrial—a retrial not focused at all on the issue of [the omitted element], but on contested issues on which the jury was properly instructed." *Neder*, 527 U.S. at 15; see also *Johnson*, 520 U.S. at 470. In the instant case, correcting the error would not mean reversing a conviction or granting a new trial. It would simply mean re-sentencing respondents for the crime that was presented to the grand and petit juries. *Neder* and *Johnson* are not only readily distinguishable but patently irrelevant to this case.

In the district court, petitioner failed to obtain from the grand jury an indictment that charged a § 841(b)(1)(A) offense, which, petitioner concedes, requires drug quantity to be included in the indictment. See *Apprendi* v. *New Jersey*, 530 U.S. 466, 490 (2000). The sentencing judge nevertheless found by a preponderance of the evidence that the quantity of drugs sufficed for a § 841(b)(1)(A) crime, and sentenced respondents for that crime. In short, there can be little doubt that sentencing a defendant for a crime not included in the grand jury's indictment on the basis of facts not found beyond a reasonable doubt by the petit jury constitutes a paradigm structural error. This type of error does more than "affect[] the framework within which the trial proceeds." *Fulminante*, 499 U.S. at 310. It deprives a defendant of "basic protections" without which "a criminal trial cannot reliably serve its function as a vehicle for determination of guilt or innocence, and no criminal punishment may be regarded as fundamentally fair." *Rose*, 478 U.S. at 577-78 (citation omitted).

C. The Denial Of The Right To A Petit Jury Verdict Beyond A Reasonable Doubt On Each Element Of An Offense Is Structural Error Under *Sullivan* v. *Louisiana*.

In addition to the indictment error in this case, the error in having a sentencing judge rather than a petit jury decide an element of the offense under the preponderance of the evidence standard rather than the reasonable doubt standard constitutes the same type of error that the Court determined to be structural in *Sullivan* v. *Louisiana*, 508 U.S. 275 (1993). In *Sullivan*, this Court considered a trial where a defendant was convicted under the wrong standard of proof: the judge gave the petit jury an erroneous reasonable doubt instruction. This error "unquestionably qualifie[d] as 'structural error,'" according to the Court. *Id.* at 282.

> Denial of the right to a jury verdict of guilt beyond a reasonable doubt is certainly [a structural error], the jury guarantee being a "basic protection" whose precise effects are unmeasurable, but without which a criminal trial cannot reliably serve its function. The right to trial by jury reflects, we have said, "a profound judgment about the way in which law should be enforced and justice administered."

Id. at 281 (internal citation omitted).

Sullivan's error was the application of the wrong standard of proof, and it could not be remedied by allowing the reviewing court to weigh the evidence under the correct standard of proof, for this would deny the essential guarantees that guilt be found by a jury beyond a reasonable doubt. *Id.* at 281, 279. In the instant case, respondents suffered an equivalent error when an element of their sentenced offense was found, not under a faulty version of the beyond a reasonable doubt standard, but unambiguously under the wrong standard—by a mere preponderance of the evidence—and by the wrong fact-finder. This error alone qualifies as a

Sullivan structural error mandating reversal. There is an even more egregious injustice in this case than existed in *Sullivan*, however, since respondents suffered another error going to the very structure of the criminal justice process: the indictment did not charge the offense for which they were sentenced. If a flawed statement of the reasonable doubt standard was structural error, it defies reason to conclude that no structural error has occurred where there is blatant use of a lower standard by the wrong fact-finder and an indictment error this Court has already described as "far too serious" to shrug off as harmless error. *Stirone*, 361 U.S. at 217.

D. Structural Errors Warrant Correction Regardless of the Evidence.

According to this Court, when an indictment fails to allege an element of the crime, the fundamental nature of the error necessitates correction. See *Stirone*, 361 U.S. at 219 (reversing a conviction because of a "fatal error" in the indictment's failure to allege an element of the crime); *Bain*, 121 U.S. at 13; *Silber* v. *United States*, 370 U.S. 717 (1962) (per curiam). While minor defects in indictments may not require correction, "the substantial safeguards to those charged with serious crimes cannot be eradicated under the guise of technical departures from the rules." *Smith* v. *United States*, 360 U.S. 1, 9 (1959).

This Court has held that structural errors "require reversal *without regard to the evidence in the particular case*." *Rose*, 478 U.S. at 577 (citing *Chapman*, 386 U.S. at 23 n.8 (emphasis added)). They invalidate a conviction even though there may be no reasonable doubt that the defendant is guilty. See, *e.g.*, *Vazquez* v. *Hillery*, 474 U.S. 254 (1986) (reversing a conviction despite overwhelming evidence of the defendant's guilt because of an error in the grand jury composition). A structural error affects more than the accuracy of the result; by definition, it undermines the very process itself, and such an error cannot be plugged into an

evidence-quantifying formula. In *Tumey* v. *Ohio*, 273 U.S. 510 (1927), the Supreme Court reversed a conviction entered by a biased judge, even though "evidence show[ed] clearly that defendant was guilty," because "[n]o matter what the evidence was against him, [the defendant] had the right to have an impartial judge." *Id.* at 535. Similarly, a defendant has a right to indictment by a grand jury and conviction by a petit jury using the beyond a reasonable doubt standard no matter what the evidence is against him.

Recognizing these principles, this Court in *Sullivan* reversed a conviction when the petit jury guarantee was undermined by a faulty reasonable doubt instruction. The Court forbade a reviewing court to "engage in pure speculation—its view of what a reasonable jury would have done," when the result was that the "'wrong entity judge[s] the defendant guilty.'" *Sullivan*, 508 U.S. at 281 (alteration in *Sullivan*) (quoting *Rose*, 478 U.S. at 578). "[T]o hypothesize a guilty verdict that was never in fact rendered—no matter how inescapable the findings to support that verdict might be—would violate the jury-trial guarantee." *Id.* at 279. For the same reasons, a court is not permitted to speculate on a grand jury's possible decision on an element of an offense that was never charged. "To allow . . . the court . . . to make a subsequent guess as to what was in the minds of the grand jury at the time they returned the indictment would deprive the defendant of a basic protection which the guaranty of the intervention of a grand jury was designed to secure." *Russell*, 369 U.S. at 770.

This Court has explained that structural errors are errors that "are so intrinsically harmful as to require automatic reversal (*i.e.*, affect 'substantial rights') without regard to their effect on the outcome." *Neder*, 527 U.S. at 7. Because such structural errors "deprive defendants of 'basic protections,'" *id.* at 8, they "will always invalidate the conviction." *Sullivan*, 508 U.S. at 279 (citing *Fulminante*,

499 U.S. at 309-10). Petitioner argues that in this case plain-error review applies and trumps the rule of reversal. See Pet. Br. at 43. However, respondents did not forfeit their claim of error, see *infra* III.A.3, and the rule of reversal compels correction of the structural errors in this case.

III. THE ERRORS IN THIS CASE WARRANT REVERSAL UNDER HARMLESS-ERROR OR PLAIN-ERROR REVIEW.

A. Reversal Is Warranted Under Harmless-Error Review.

1. Respondents' Right To Liberty And Their Right To A Grand Jury Were Violated By The Errors Here.

In all events, the errors in this case warrant reversal under harmless-error review. The error should be corrected unless the prosecution can show beyond a reasonable doubt that the error was harmless, *i.e.*, that it did not affect a defendant's "substantial rights." Fed. R. Crim. P. 52(a); see also *Delaware* v. *Van Arsdall*, 475 U.S. 673, 681 (1986). Petitioner cannot meet its burden here because this Court already has determined that an indictment error like the one in this case can never be harmless error: "[d]eprivation of such a basic right [as the grand jury right] is far too serious to be treated as nothing more than a variance and then dismissed as harmless error." *Stirone* v. *United States*, 361 U.S. 212, 217 (1960).

In addition, an illegal increase in a sentence from a statutory maximum of 20 years to a term of life imprisonment, or from 20 years to 30 years, plainly affects a defendant's substantial rights. The offense whose elements were properly alleged in the indictment here carried a maximum statutory sentence of 20 years. However, five of the respondents were illegally sentenced to life in prison, and two others were illegally sentenced to 30 years in prison.

This error unlawfully deprived respondents of their right to liberty. This Court has already explained in *Apprendi* that if a defendant is sentenced based on a fact that was not proven to the jury, "it is obvious that both the loss of liberty and the stigma attaching to the offense are heightened." *Apprendi* v. *New Jersey*, 530 U.S. 466, 484 (2000). "[I]t can hardly be said that the potential doubling of one's sentence—from 10 years to 20—has no more than a nominal effect. Both in terms of absolute years behind bars, and because of the more severe stigma attached, the differential here is unquestionably of constitutional significance," found the *Apprendi* Court. *Id.* at 495. The increases in the sentences in this case impose precisely the same grievous losses as those in *Apprendi*.

2. Respondents Did Not Receive The Constitutionally Required Notice Of The Crime For Which They Were Sentenced, But Even If They Had, Such Notice Could Not Cure The Defects In The Proceeding Here.

One of the purposes of the grand jury indictment is to provide notice to the accused of the charges against him. *Russell* v. *United States*, 369 U.S. 749, 763 (1962). The superseding indictment in this case did not include any allegations regarding the quantity of drugs, see *supra*, n.1, nor did the prosecution attempt to make up for this omission by later filing an information alleging the quantity, as it did in some cases. See, *e.g.*, *United States* v. *Promise*, 255 F.3d 150, 163 (4th Cir. 2001) (en banc), *petition for cert. filed*, No. 01-6398 (U.S. Sept. 20, 2001). Petitioner argues that this Court should ignore the errors in this case because respondents were not surprised by their sentences, based on the original indictment that had been superseded. Pet. Br. at 47. Petitioner fails to cite any case supporting the counter-intuitive proposition that a superseded indictment constitutes the "notice" due to an accused under the Constitution. See *id.* at 24. Compare *United States* v. *Olson*, 716 F.2d 850, 852-53

(11th Cir. 1983) (rejecting the district court's conclusion that defendant's lack of surprise rendered harmless the prosecution's failure to file a statutorily required information on a recidivism enhancement). To the contrary, the only inference to draw is that the offenses charged in the prior indictment have been abandoned in favor of the charges included in the superseding indictment. When the prosecution chose to drop the quantity allegation, the message it sent was that it had decided that it had insufficient evidence to prove this element beyond a reasonable doubt.

This Court has required an indictment to apprise the defendant of the accusation against him by including "such a statement of the facts and circumstances as will inform the accused of the specific offence, coming under the general description, with which he is charged." *United States* v. *Hess*, 124 U.S. 483, 487 (1888). If an indictment fails to include the essential facts, it "enables [a defendant's] conviction to rest on one point and the affirmance of the conviction to rest on another. It gives the prosecution free hand on appeal to fill in the gaps of proof by surmise or conjecture." *Russell*, 369 U.S. at 766. That is precisely what happened here. Petitioner relies on evidence that may never have been shown to the grand jury (and, in any event, might have been ignored), and an accusation of drug quantity that was submitted to neither the grand jury nor the petit jury for a determination.

Even had the prosecution provided notice, this post-indictment notice would not suffice to remedy the errors here because the omission of an element from the indictment deprives an accused of more than notice. Beyond notice is the separate constitutional right, protected by Fifth Amendment, that a defendant be tried upon charges found by a grand jury. *Id.* at 770. Notice would not make up for the right that was violated—a determination by fellow citizens that there was probable cause supporting the precise charge. Thus, whatever notice was provided outside of the indictment,

a court "cannot know whether the grand jury would have included in its indictment a charge that" was never presented to it. *Stirone*, 361 U.S. at 219. Respondents' sentences cannot stand under harmless-error review because their substantial rights were undeniably affected.

3. Respondents Are Not Subject To Plain-Error Review Because They Objected At The Earliest Possible Moment In The Proceeding.

Plain-error review should not apply to this case because respondents objected at the earliest possible time during the proceeding. It was not until the prosecution first sought to establish the quantity element at sentencing that respondents could logically object to the quantity issue. See, *e.g.*, *United States* v. *Strayhorn*, 250 F.3d 462, 467 (6th Cir. 2001) (concluding that a defendant's objections to drug quantity on non-constitutional grounds at his pre-*Apprendi* guilty plea hearing and at sentencing sufficed to preserve an *Apprendi* claim for appeal). When the indictment charged an offense carrying a 20-year sentence, and the jury found facts supporting the same, respondents were not obligated to object to a failure to offer charges supporting a life-term sentence. Indeed, respondents could not object to the denial of their Fifth and Sixth Amendment rights until they appreciated that they were being sentenced for a crime for which they were never charged.

Plain-error review is designed to prevent "sandbagging" (where a defendant stays deliberately silent about an error at trial so that he may obtain a reversal on the basis of the error on appeal). See, *e.g.*, *Johnson* v. *United States*, 520 U.S. 461, 465-66 (1997) (noting that preventing sandbagging is important in determining whether to notice plain error). Respondents here could hardly be accused of "sandbagging" when *Apprendi*, upon which they rely, was not decided until after their trial. Respondents objected to the quantity of drugs at the earliest logical moment, at sentencing. Accordingly,

correcting the error in this case would not allow respondents to obtain "any strategic benefit from [their] failure to timely object to the error." *Promise*, 255 F.3d at 195 (Motz, J., dissenting).

The requirement that a defendant object exists so that the district court can correct the alleged error. See *United States* v. *Atkinson*, 297 U.S. 157, 159 (1936). In this case, however, the only error the district court could correct was the increase in sentence based on a finding of drug quantity. Respondents presented that objection in timely fashion. The district court could not have ruled that an *Apprendi*-type error had occurred, even had respondents raised a constitutional argument, because neither *Apprendi* nor *Jones* had been decided, and existing circuit precedent would have defeated the argument. See, *e.g.*, *United States* v. *Fletcher*, 74 F.3d 49, 53 (4th Cir. 1996). In fact, this Court has acknowledged the futility in requiring a defense attorney to "mak[e] a long and virtually useless laundry list of objections to rulings that were plainly supported by existing precedent." *Johnson*, 520 U.S. at 468. No purpose in promoting an orderly judicial process would be served by imposing the penalty of plain-error review in this case. See, *e.g.*, *United States* v. *Novey*, 922 F.2d 624, 629 (10th Cir. 1991) ("An exception to the rule precluding review exists where an intervening Supreme Court decision changes the law while an appeal is pending."); *United States* v. *Mulder*, 889 F.2d 239, 240 (9th Cir. 1989) (defendant's "claims are not waived because this failure [to raise the claims in the district court] was not due to any 'belated decision to change trial tactics,' but was caused by a recent Supreme Court case that directly affected his claim") (citation omitted). Plain-error review should not apply in this case.

B. Application of Plain-Error Review Warrants Affirmance of the Court of Appeals Decision.

1. Respondents' Substantial Right To Liberty Was Violated.

Under plain-error review, an error must affect a defendant's substantial rights. Fed. R. Crim. P. 52(b). In this case, when the sentencing court sentenced respondents for a crime with which they had not been charged, it deprived five respondents of their substantial liberty interest by increasing their incarceration from 20 years to life, and from 20 years to 30 years in the case of two respondents. See *supra*, III.A.1.

Petitioner tries to avoid this conclusion by speculating that had it charged respondents for the more serious offense, it would have obtained the same result. Pet. Br. at 48. This conjecture is irrelevant since the effect on respondents' rights is clear. See *Apprendi*, 530 U.S. at 484. Moreover, it ignores this Court's admonition to reviewing courts not to speculate on the result of grand jury proceedings: "neither this [Court] nor any other court can know that the grand jury would have been willing to charge" an offense other than the one included in the actual indictment. *Stirone*, 361 U.S. at 217.

In *Vasquez* v. *Hillery*, 474 U.S. 254 (1986), this Court forbade courts to conduct a review of the potential harm when the "structural integrity of the criminal tribunal itself" was "undermine[d]" because the effect of the error cannot be ascertained, and a court "cannot know" how the grand jury would have decided under alternative conditions. *Id.* at 263-64. Although *Hillery* was addressing grand jury discrimination, the principle that a court cannot speculate on a grand jury's decision applies equally to the error in this case. Indeed, *Hillery* explained that the grand jury "does not determine only that probable cause exists to believe that a defendant committed a crime, or that it does not," but also has the power to select "a greater offense or a lesser offense." *Id.* at 263.

Because the "'grand jury is not bound to indict in every case where a conviction can be obtained,'" *id.*, an evaluation of the evidence in hindsight cannot stand in for the grand jury's decision on whether to indict. Cf. *Sullivan* v. *Louisiana*, 508 U.S. 275, 281 (1993) (forbidding a reviewing court to "engage in pure speculation—its view of what a reasonable jury would have done," when the result was that the "'wrong entity judge[s] the defendant guilty'") (alteration in *Sullivan*) (quoting *Rose*, 478 U.S. at 578). Moreover, unlike a petit jury error, where the entire record is available to evaluate the input of a potential mistake, there is no record of grand jury proceedings that could serve as a benchmark for making a harmless-error assessment. A reviewing court therefore cannot substitute itself for the grand jury to determine the outcome of a grand jury proceeding on a charge that was not presented. For this reason, the failure to present a charge to the grand jury necessitates a presumption of prejudice. See *Stirone*, 361 U.S. at 217.

2. The Errors Undermined The Integrity, Public Reputation, And Fairness Of The Criminal Justice Proceeding.

The errors in this case merit reversal under plain-error review because they seriously affected the integrity, public reputation, and fairness of the judicial proceedings. See Fed. R. Crim. P. 52(b); *United States* v. *Olano*, 507 U.S. 735, 736 (1993). Respondents' sentences exceeded the statutory maximum for the indicted offense. The terms of their imprisonment were based on an element of an offense that was not charged in the grand jury indictment, and that was not found by the petit jury beyond a reasonable doubt. The errors deprived respondents of their Fifth and Sixth Amendment guarantees of an indictment by a grand jury and a petit jury verdict based upon the beyond a reasonable doubt standard of proof. This Court has exercised its own discretion under the plain-error standard to notice an error in an indictment that

had not been raised either before the court of appeals or this Court itself. *Silber*, 370 U.S. at 717. There was no error when the court of appeals did the same.

This Court has repeatedly affirmed that a violation of "such a basic right" as indictment by a grand jury can never be harmless error, *Stirone*, 361 U.S. at 217, that a defendant has a right not be sentenced or "convicted on the basis of facts not found by, and perhaps not even presented to, the grand jury which indicted him," *Russell*, 369 U.S. at 770; and that an "indictment found by a grand jury [is] indispensable to the power of the court to try the petitioner for the crime with which he was charged," *Ex parte Bain*, 121 U.S. 1, 12-13 (1887). Petitioner's position would require that these bedrock principles be rejected, thereby undermining the grand jury's role as a structural safeguard for the accused.

3. The Fourth Prong Of Plain-Error Review Calls For The Evaluation Of An Error's Effect Independent Of A Defendant's Innocence Or Guilt Where The Right Violated Protects Values Distinct From The Accuracy Function Of The Trial.

Petitioner claims that the errors in this case should not be corrected because there was evidence against respondents. Correcting plain error, however, does not depend on a defendant's innocence or guilt. Indeed, this Court has explained that an error can "seriously affect the fairness, integrity or public reputation of judicial proceedings *independent of the defendant's innocence*." *Olano*, 507 U.S. at 736-37 (internal quotation marks omitted) (emphasis added). Importantly, the *Olano* Court explained that a court "should" exercise its discretion to correct any plain error prejudicing a defendant's substantial rights which meets this fourth prong of the plain error test. *Id.* at 736.

Weighing evidence, which petitioner would have this Court do, is an analysis that applies to "the admission of . . . forms

of improperly admitted evidence." *Fulminante*, 499 U.S. at 310. It may be an appropriate exercise if the alleged error was minor or occurred during the presentation of the case to the petit jury. See *Neder* v. *United States*, 527 U.S. 1, 16-18 (1999); *Johnson*, 520 U.S. at 467. The error in this case, however, is not about accuracy but about the core structure of the criminal process. In dismissing an indictment because of a complete lapse in the grand jury process, this Court explained that "[t]he injury is not limited to the defendant—there is injury to the jury system, to the law as an institution, to the community at large, and to the democratic ideal reflected in the processes of our courts." *Ballard* v. *United States*, 329 U.S. 187, 195 (1946) (grand jury discrimination). The Court has similarly protected other rights that serve functions unrelated to outcome accuracy. In *McKaskle* v. *Wiggins*, 465 U.S. 168 (1984), for instance, the Court addressed a defendant's right to represent himself at trial. The Court did not consider the evidence against the defendant (who was twice convicted by a jury, the first time on a defective indictment), because the right did not exist to promote the accuracy of the outcome but rather to protect dignitary values. See *id.* at 177 n.8, 182.

Evaluation of the evidence is similarly inapposite here, where the right to a grand jury protects values beyond the truth-seeking function of the trial. Like the right to self-representation, the right to a grand jury "is either respected or denied," *id.* at 177 n.8, and its denial is not amenable to an analysis of the error's effect on the outcome. Evidence-weighing is as useful in analyzing the harm of sentencing for an uncharged offense as a thermometer is in measuring the weight of a pile of bricks.

Contrary to petitioner's argument, *United States* v. *Mechanik*, 475 U.S. 66 (1986), does not suggest a different result. In *Mechanik*, a properly constituted grand jury returned a complete indictment against defendants. However,

the prosecutor had allowed two witnesses to be present at the same time before the grand jury. *Id.* at 67. This was arguably a violation of the terms of Federal Rule of Criminal Procedure 6(d), which refers in the singular to "the [grand jury] witness under examination." Without even deciding that the two-witness appearance breached the terms of Rule 6(d), the Court held that the costs of "reversal of a conviction" and retrial would outweigh the harm of such an error. *Mechanik*, 475 U.S. at 72. The *potential* technical error in *Mechanik* did not go to the core functions of the grand jury (indictment) and instead went only to the procedural mechanism of the grand jury's review of evidence and testimony. It stands in stark contrast to the fundamental and acknowledged errors in the instant case. In *Mechanik*, the mistake was, at most, a violation of a rule, whereas in the instant case, substantive, pervasive, and systemic errors violated the Fifth and Sixth Amendments and impaired the very core of the federal criminal justice system.

In this case, the multiple errors went not just to the question of accuracy—though certainly the wrong standard of proof employed by the wrong fact-finder has an impact on the accuracy of the trial result—but also to values reaching beyond the correctness of verdicts. By abandoning the requirement that a grand jury must return a indictment charging an offense before a federal court can sentence a defendant for that offense, the district court (albeit unwittingly) allowed the structural integrity of the proceeding to be irreparably compromised. Weighing the evidence cannot repair the harm to the judicial process.[12]

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[12] Petitioner's argument that there would be injustice if the more culpable defendants did not receive higher sentences, Pet. Br. at 49, cuts against petitioner. The fault for any such discrepancy lies with the prosecution for not formally charging the more serious offense against those who committed a more serious offense.

C. The Lower Court's Choice To Reverse In A Case Where Judicial Integrity Was Compromised Preserves The Discretionary Nature Of Plain-Error Review.

To sentence a defendant for an offense that was not charged in an indictment or found by a jury is an error that will always affect the fairness, integrity, and public reputation of the judicial process. However, the court of appeals did not, as petitioner suggests, institute a per se rule. Instead, the court chose to exercise its discretion:

> Because we believe that the "nature of the error" is "fundamental," that the "plain error was committed in a matter so absolutely vital to defendants," and, most importantly, that the error "seriously affect[s] the fairness, integrity or public reputation of judicial proceedings," we "*feel ourselves at liberty* to correct it."

Pet. App. 12a (emphasis added) (internal citations omitted) (alteration in original). The decision of the court of appeals did not limit courts' discretion to notice or not notice errors, as the petitioner misstates the holding. See Pet. Br. at 12. Rather, the court elected to exercise its discretion because it found that the error injured the integrity of the proceedings. Rule 52(b) grants lower courts the discretion to correct such errors.

When the court of appeals enjoys "discretion" to make a determination, this Court should not reverse that determination absent an abuse of that discretion. See, *e.g.*, *United States Nat'l Bank of Oregon* v. *Indep. Ins. Agents of Am., Inc.*, 508 U.S. 439, 447-48 (1993) (holding that the court of appeals "had discretion to consider" an issue not raised by either party, and its decision to consider the issue "was certainly no abuse of its discretion"); *Weisgram* v. *Marley Co.*, 528 U.S. 440, 454, 456 (2000) (affirming the circuit court in its "exercise of 'informed discretion'" because it "did not abuse its discretion"). It is entirely conceivable that a

court might decline to exercise its discretion to notice an error in a closer case where a genuine issue arose as to whether the indictment was indeed fatally defective. But it is inconceivable that a court's choice to notice the Fifth and Sixth Amendment errors in this case constitutes an improper exercise of its statutory discretion.

In fact, petitioner's argument, if accepted, would do just what it accuses the court of appeals of doing: it would eliminate a court's discretion under plain-error review. If petitioner is successful in promoting its newly fashioned rule, then a court will be unconditionally barred from correcting an error—no matter how seriously the error affected the integrity, fairness, or reputation of the proceeding—if there is a certain quantity of evidence against the defendant. The per se approach advanced by petitioner is inconsistent with the discretionary nature of plain-error review.

* * * *

This Court has already explained the consequences of allowing a trial court to convict or sentence a defendant for an offense that was not in an indictment:

> If it lies within the province of a court to change the charging part of an indictment to suit its own notions of what it ought to have been, or what the grand jury would probably have made it if their attention had been called to suggested changes, the great importance which the common law attaches to an indictment by a grand jury, as a prerequisite to a prisoner's trial for a crime, and without which the Constitution says "no person shall be held to answer," may be frittered away until its value is almost destroyed.

Bain, 121 U.S. at 10. The historic place of the grand jury in protecting the accused from the government underscores the centrality of the indictment process in a criminal proceeding. Similarly, when the prosecution withholds an element from

the grand jury and the court removes an element from the petit jury, to instead sentence the defendant for a different offense under the wrong standard of proof, the criminal justice system has been dealt a severe, if not fatal, blow. To ignore such errors would require this Court to discard centuries of precedent protecting the rights of defendants and the integrity of the process itself in favor of a system that seeks conviction at all costs. The Framers of the Constitution rejected that system more than 200 years ago. This Court should implement the Framers' intent.

CONCLUSION

For the reasons stated above, the judgment of the court of appeals should be affirmed.

Respectfully submitted,

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UNITED STATES OF AMERICA, PETITIONER

v.

LEONARD COTTON, MARQUETTE HALL, LAMONT THOMAS, MATILDA HALL, JOVAN POWELL, JESUS HALL, AND STANLEY HALL, JR.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

REPLY BRIEF FOR THE UNITED STATES

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In the Supreme Court of the United States

No. 01-687

UNITED STATES OF AMERICA, PETITIONER

v.

LEONARD COTTON, MARQUETTE HALL, LAMONT THOMAS, MATILDA HALL, JOVAN POWELL, JESUS HALL, AND STANLEY HALL, JR.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

REPLY BRIEF FOR THE UNITED STATES

Respondents contend that the error in this case—the imposition of an enhanced sentence in the absence of a grand jury finding on the enhancing fact—is jurisdictional, structural, and reversible under the harmless-error or plain-error standard. Each of those submissions is incorrect. The error here—like the error in imposing a conviction in the absence of a petit jury finding on an essential fact—is subject to harmless-error and plain-error review, and, under those standards, the sentences in this case should be sustained.

I. THE OMISSION FROM THE INDICTMENT OF A FACT THAT RAISES THE STATUTORY MAXIMUM SENTENCE IS NOT A JURISDICTIONAL ERROR

Respondents assert (Br. 12-21) that, because the district court lacked authority in light of *Apprendi* v. *New Jersey*, 530 U.S. 466 (2000), to impose a sentence that exceeds the

otherwise-applicable statutory maximum based on a fact not alleged in the indictment, the court committed a "jurisdictional error." Respondents are mistaken. The error in this case, while a constitutional error under *Apprendi*, is not a jurisdictional error.[1]

1. The category of "jurisdictional errors," which always require reversal even if not preserved, is an exceedingly narrow one. A court commits a "jurisdictional error" in that sense only if it acts in the absence of subject-matter jurisdiction—an error that, unlike other errors in a criminal prosecution, cannot be waived by the parties in any circumstance. The right to indictment by a grand jury may be waived, as respondents appear to acknowledge (Br. 17).[2]

As this Court has explained, "[j]urisdiction is the power to decide a justiciable controversy," *United States* v. *Williams*, 341 U.S. 58, 66 (1951), "and covers wrong as well as right decisions," *Lamar* v. *United States*, 240 U.S. 60, 64 (1916). Thus, "[o]nce subject-matter jurisdiction has properly attached, courts may exceed their authority or otherwise err without loss of jurisdiction." *Prou* v. *United States*, 199 F.3d 37, 45 (1st Cir. 1999) (district court's error in imposing enhanced sentence based on prior convictions not alleged in statutorily required information was not jurisdictional); see *United States* v. *Wey*, 895 F.2d 429, 431 (7th Cir. 1990)

[1] A number of the cases cited by respondents (*e.g.*, Br. 13) stand only for the proposition that an indictment must allege each element of an offense. Those cases are essentially irrelevant to the question here. This case concerns not whether the district court committed an error, but instead whether such an error requires automatic reversal, even if not raised in the district court.

[2] Respondents observe (Br. 18) that a defendant cannot, by waiving his right to indictment, give a federal district court "jurisdiction over any state law violation charged in an information." But that is because a true absence of subject-matter jurisdiction cannot be waived, and federal courts generally lack jurisdiction over state crimes. It does not follow that *other* indictment errors or omissions are jurisdictional in character.

("Courts may err, even offend against the Constitution, without losing subject-matter jurisdiction.").[3]

Clearly, the district court had subject-matter jurisdiction over this case by virtue of 18 U.S.C. 3231, which gives district courts "original jurisdiction * * * of all offenses against the laws of the United States." The superseding indictment alleged a complete federal felony offense under 21 U.S.C. 846. Accordingly, just as a court is not "oust[ed] * * * of jurisdiction" when it convicts a defendant under an unconstitutional statute, *Williams*, 341 U.S. at 66, the district court was not ousted of jurisdiction when it sentenced respondents under a procedure that was subsequently held to be unconstitutional.

Contrary to respondents' suggestion (Br. 19), the error in this case is unlike the error in cases such as *In re Bonner*, 151 U.S. 242 (1894), in which the court imposed a punishment that was not authorized by Congress. Here, Congress expressly authorized a maximum penalty of life imprisonment for drug trafficking offenses that involve at least 50 grams of cocaine base, as did respondents' offense in this case. See 21 U.S.C. 841(b)(1)(A)(iii). The error results from the absence of *procedural* prerequisites to the imposition of that sentence. Cf. *Libretti* v. *United States*, 516 U.S. 29, 56 & n.1 (1995) (Stevens, J., dissenting) (observing that, although "extrastatutory punishments implicate the very power of a court to act," "the court's power to act is not similarly impli-

[3] *Williams* and *Lamar* hold that a defendant's claim that an indictment does not allege any offense against the United States "goes only to the merits of the case," and not to the court's jurisdiction. *Lamar*, 240 U.S. at 65. See U.S. Br. 39-40. Respondents suggest (Br. 16) that those cases are distinguishable because they did not "involve[] an indictment that omitted elements of a crime," but instead involved indictments that alleged facts that, according to the defendants, did not satisfy the elements of a crime. But respondents do not explain why the error in omitting an element would be "jurisdictional," while the error in failing to charge *any* federal offense is not.

cated when it imposes a sentence that is arguably erroneous but nonetheless within the range authorized by statute").

2. Respondents rely (Br. 12, 15, 49) on *Ex parte Bain*, 121 U.S. 1, 13 (1887), which held that a court had erred in trying a defendant on a theory narrower than the one alleged in the indictment, and described that error as "jurisdiction[al]" in nature. As previously explained (U.S. Br. 40-42), *Bain* dates from an era in which the Court considered it "well settled" that its power to grant habeas corpus relief was limited to cases in which "the [lower] court had no jurisdiction to render the judgment which it gave." *Bain*, 121 U.S. at 3. As a consequence, the Court expanded the category of "jurisdictional" errors to include various constitutional and statutory errors made by courts that did not lack jurisdiction. See *Wainwright* v. *Sykes*, 433 U.S. 72, 79 (1977) (observing that the Court's use of "the concept of jurisdiction" to determine the availability of habeas relief ultimately became "more a fiction than anything else").

Since that era, while the Court has continued to find reversible error when an indictment did not adequately allege the offense of conviction, the Court has not continued to characterize such error as "jurisdictional." See, *e.g.*, *Silber* v. *United States*, 370 U.S. 717 (1962) (per curiam); *Russell* v. *United States*, 369 U.S. 749 (1962); *Stirone* v. *United States*, 361 U.S. 212 (1960). Indeed, the Court twice described the error in *Silber* as one that a reviewing court "may" notice, 370 U.S. at 718, implying a degree of discretion inconsistent with the treatment of true jurisdictional errors. *Bain* itself has been overruled, *United States* v. *Miller*, 471 U.S. 130 (1985), and whatever survives of its reasoning need not be characterized as "jurisdictional." See *id.* at 142-143 (agreeing in dictum with the "aspect" of *Bain* that a court commits error by convicting a defendant of "an offense different from that which was included in the indictment," without suggesting that such an error is jurisdictional).

Reviving the expansive concept of "jurisdictional error" used in *Bain* would undermine the concerns for finality and judicial economy underlying the harmless-error and plain-error rules. Many errors in a criminal prosecution may, to the same extent as the error here, be characterized as a court's exceeding its constitutional or statutory authority—including the errors that were held not to require reversal in *Johnson* v. *United States*, 520 U.S. 461 (1997), and *Neder* v. *United States*, 527 U.S. 1 (1999), where the courts exercised authority that, under the Sixth Amendment, should have been exercised by the petit jury.[4]

3. Contrary to respondents' suggestion (Br. 20), Rule 12(b)(2) of the Federal Rules of Criminal Procedure does not preclude harmless-error or plain-error review in this case. Rule 12(b) specifies various defenses and objections that "must be raised prior to trial." Rule 12(b)(2) includes within that category "defenses and objections based on defects in the indictment or information (other than that it fails to show jurisdiction in the court or to charge an offense which objections shall be noticed by the court at any time during the pendency of the proceedings)." Read in context, the parenthetical phrase provides only that the described objections, even if not raised before trial, are not waived. See Fed. R. Crim. P. 12(f). It does not address the standard that a reviewing court is to apply to such objections, nor does it render inapplicable a rule "having apparently equal dignity," Rule 52 of the Federal Rules of Criminal Procedure. *United States* v. *Vonn*, 122 S. Ct. 1032, 1050 (2002).

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[4] Respondents' reliance (Br. 13, 17) on other cases to support a claim of "jurisdictional" error is similarly misplaced. *Albrecht* v. *United States*, 273 U.S. 1, 8 (1927), mentioned the requirement of an indictment only in dictum (and cited only *Bain*); the issue was whether a warrant for arrest was invalid. *Post* v. *United States*, 161 U.S. 583 (1896), concerned the effect of a law requiring a case to be prosecuted in the division of the District of Minnesota where the offense was committed; the Court's holding that a different division lacked jurisdiction is irrelevant to the issue in this case.

In any event, the error in this case does not come within either the general category described by Rule 12(b)(2) or the two subcategories described in its parenthetical phrase. The superseding indictment showed subject-matter jurisdiction in the district court and charged an offense under 21 U.S.C. 846. See U.S. Br. 36 n.11. The error in this case occurred at sentencing when the district court imposed an enhanced sentence based on a finding of drug quantity in the absence of required procedural protections. That error is not in its essence based on a "defect" in the indictment, the subject of Rule 12(b)(2).

II. THE OMISSION FROM THE INDICTMENT OF A FACT THAT RAISES THE STATUTORY MAXIMUM SENTENCE IS NOT A STRUCTURAL ERROR

Respondents contend (Br. 22-38), principally based on this Court's decisions in *Silber*, *Russell*, and *Stirone*, that the district court committed a "structural" error in imposing an enhanced sentence based on a fact not alleged in the indictment. Those cases, however, predate this Court's comprehensive adoption of harmless-error analysis for constitutional errors in *Chapman* v. *California*, 386 U.S. 18 (1967). Consequently, the cases cannot be assumed to reflect the current distinction between errors that are, and are not, subject to harmless-error analysis. U.S. Br. 32, 34.

Equally important here, the Court has unanimously recognized that even structural errors, if not preserved, do not entitle the defendant to automatic reversal on plain-error review. See *Johnson*, 520 U.S. at 467. Indeed, the dissenting Justices in *Neder*, who would have held that the failure to submit an offense element to the petit jury was a structural error, recognized that the error would not automatically require reversal if not objected to at trial. See 527 U.S. at 34 (Scalia, J., concurring in part and dissenting in part). Respondents, who failed to make a constitutional

objection at trial, could not prevail without satisfying the requirements of Rule 52(b), even if the error were structural. But the error here is not.

1. Since *Chapman*, when the Court has described the "very limited class of cases" involving errors that are exempt from harmless-error analysis, the Court has not included *Silber*, *Russell*, *Stirone*, or any other case in which a defendant was convicted or sentenced based on a fact not alleged in the indictment or information. See *Neder*, 527 U.S. at 8; *Johnson*, 520 U.S. at 468-469. Nor is such an error analogous to the errors in that "very limited class." As the Court has explained, when a defendant is tried without counsel or before a biased judge or on a charge returned by a grand jury from which one race was excluded, the error "infect[s] the entire trial process" and thus "necessarily render[s] a trial fundamentally unfair." *Neder*, 527 U.S. at 8. The Court held in *Neder*, however, that an error that involves a single discrete fact, which was not submitted to the petit jury, is not of that character. Here, the error likewise involves a single discrete fact, which was not submitted to the grand jury, and thus was not the sort of error that "infect[s] the entire trial process."

2. Respondents nonetheless suggest (Br. 24-25) that the error here is analogous not to the error in *Neder*, but to the defective reasonable doubt instruction in *Sullivan* v. *Louisiana*, 508 U.S. 275 (1993). As the Court explained in *Neder*, however, "the error [in *Sullivan*] was not subject to harmless-error analysis because it 'vitiates *all* the jury's findings,' and produces 'consequences that are necessarily unquantifiable and indeterminate.'" 527 U.S. at 11 (quoting *Sullivan*, 508 U.S. at 281, 282). In contrast, the error in *Neder* did not vitiate any of the petit jury's findings, but simply prevented the petit jury from making an additional finding on the materiality element. *Ibid.* Similarly, the district court's error in this case does not implicate any of the grand jury's (or petit jury's) findings on any of the elements

of a drug conspiracy offense under 21 U.S.C. 846. The district court's error was in relying on one additional fact, which the grand jury (and the petit jury) had not been asked to find, in imposing sentence.

Nor does the error in this case, any more than the error in *Neder*, produce "necessarily unquantifiable and indeterminate" consequences. *Sullivan*, 508 U.S. at 281-282. The errors in both cases involved a district court's reliance on a fact that was not submitted to the correct fact-finder. In both cases, a reviewing court can reliably determine whether the error was prejudicial by inquiring whether the correct fact-finder, examining the entire record under the applicable standard of proof, would have found the fact, and whether the defendant had adequate notice of the fact and opportunity to contest it. See *Neder*, 527 U.S. at 17; *Johnson*, 520 U.S. at 468-469 (applying similar analysis under fourth component of plain-error standard).[5]

Respondents contend (Br. 24-25) that the omission of drug quantity from the superseding indictment affected the "framework" of the trial, and therefore qualifies as a "structural" error. But all parties to this case understood that the punishment scheme of 21 U.S.C. 841(b) made drug quantity a critical fact bearing on the maximum punishment available under the statute. All parties also understood that the district court (erroneously, in hindsight) would determine that fact at sentencing. The absence of an allegation in the indictment on the threshold drug quantities did not mislead respondents into thinking that drug quantity was irrelevant to the prosecution.

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[5] *Neder* disavowed the "alternative" rationale in *Sullivan*, on which respondents rely (Br. 37), that it would be "pure speculation" to engage in harmless-error analysis of an error that "prevents the jury from rendering a 'complete verdict' on *every* element of the offense." *Neder*, 527 U.S. at 11. *Neder* explained that the absence of a "complete verdict" establishes only that an error occurred, not that the error requires reversal without regard to its prejudicial impact. *Id.* at 12-13.

Apparently focusing on the petit jury's failure to find threshold drug quantities, respondents attempt (Br. 33) to distinguish *Neder* on the ground that the district court in that case found the materiality element "under the correct standard of proof," whereas the district court in this case found drug quantity by a preponderance of the evidence. But *Neder*'s analysis of whether the error should be classified as "structural" did not turn on the standard of proof applied by the district court in finding a fact that should have been submitted to the petit jury. See 527 U.S. at 8-15. Indeed, the Court relied (*id.* at 10) on earlier cases applying harmless-error analysis to erroneous jury instructions where the omitted element was not found by the judge *or* jury to have been proved beyond a reasonable doubt. See, *e.g.*, *Rose* v. *Clark*, 478 U.S. 570, 580 (1986). Here, moreover, the grand jury was not required to find threshold drug quantity beyond a reasonable doubt to return an indictment; all that was required was a finding of probable cause.[6]

3. Respondents suggest various reasons why the district court's imposition of a sentence based on a fact not submitted to the grand jury should be regarded as a structural error. But none of those reasons justifies distinguishing the grand jury from the petit jury with respect to structural error. Likewise, none justifies a *per se* rule of reversal on plain-error review for grand jury omissions, contrary to the approach taken in *Johnson* to petit jury omissions.

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[6] Respondents also assert (Br. 33) that *Neder* and *Johnson* involved "pragmatic considerations that do not obtain here," apparently that a retrial in those cases would have demanded more judicial resources than would a resentencing in this case. But nothing in *Neder* or cases finding structural error turns on the burden on the judicial system of correcting the error. See, *e.g.*, *Vasquez* v. *Hillery*, 474 U.S. 254, 262 (1986) (rejecting argument that harmless-error analysis should apply in cases of racial discrimination in grand jury selection because "requiring a State to retry a defendant, sometimes years later, imposes on it an unduly harsh penalty").

First, respondents contend (Br. 24) that the error in this case is structural, because the right to grand jury indictment "protect[s] not only the individual accused but also the system of justice." That is equally true of the right to trial by a petit jury. Yet the Court held in *Neder* that, if a district court violates that right by convicting a defendant based on a fact not submitted to the petit jury, the error is not structural. The same conclusion logically applies to a district court's error in sentencing a defendant based on a fact not submitted to the grand jury. The protection provided by the grand jury and the petit jury alike—to "the system of justice" as well as "the individual accused"—is against erroneous determinations of fact by a malicious or overzealous government official, whether a prosecutor or a judge. See, *e.g.*, *Neder*, 527 U.S. at 19; *Wood* v. *Georgia*, 370 U.S. 375, 390 (1962). That protection is not undermined when a reviewing court is able to conclude, beyond a reasonable doubt, that a grand jury or a petit jury would have found the fact, if asked. See *Neder*, 527 U.S. at 19.

Second, respondents assert (Br. 25) that the error in this case implicates the "structural allocation of powers among the judiciary, the executive, and citizenry," and specifically the Framers' choice "to place the power to initiate a federal criminal proceeding with the citizens—not with the judge, not with the prosecutor." The Framers also chose to place the (at least) equally important power to decide guilt or innocence in a federal criminal proceeding with "the citizens," *i.e.*, the petit jury. Yet, if a district court encroaches on that power by deciding an element that should have been decided by the petit jury, the error is not structural under *Neder*. The same conclusion applies when a district court decides an

element or sentencing-enhancing fact that should have been, but was not, decided by the grand jury.[7]

Moreover, this case *was* initiated by a grand jury, just as *Neder* was decided by a petit jury. In *Neder*, the Court distinguished between the failure to obtain a petit jury finding on one element, an error that is subject to harmless-error analysis, and the failure to obtain a petit jury finding on any element, an error that is not subject to harmless-error analysis. See 527 U.S. at 10-11 (contrasting errors in *Neder* and *Sullivan*). Similarly, the Court could distinguish between the error in this case, which involved the district court's reliance at sentencing on a fact that was not submitted to the grand jury, from the more pervasive errors in other cases cited or hypothesized by respondents. See, *e.g.*, *United States* v. *Moreland*, 258 U.S. 433 (1922) (defendant tried on felony charge without indictment). As the Court observed in *Neder*, "our course of constitutional adjudication has not been characterized by th[e] 'in for a penny, in for a pound' approach." 527 U.S. at 17 n.2.

Third, respondents argue (Br. 26) that any inquiry into whether the error in this case was harmless would be inappropriate, because "the grand jury's decision not to charge cannot be modified by a prosecutor, a petit jury, or a judge, whatever the evidence may be." A petit jury's decision to acquit is no less sacrosanct than a grand jury's decision not to charge. Indeed, an acquittal precludes any further prosecution of an offense, while a grand jury's rejection of an indictment does not. U.S. Br. 21. Yet, the Court has held that harmless-error analysis applies when the petit jury did *not* acquit, but instead found the defendant guilty, although without considering one element of the offense. It is equally appropriate to apply harmless-error analysis when the grand

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[7] In contrast to other constitutional allocations of power, the allocation of power between judges, prosecutors, and citizens is subject to alteration by the defendant, who may waive his right to grand jury indictment or to trial by petit jury. See U.S. Br. 29.

jury did *not* decline to charge, but instead charged the defendant with an offense, although without expressly considering one element or sentencing-enhancing fact.

Respondents rely (Br. 26) on the Court's observation in *Vasquez* v. *Hillery*, 474 U.S. 254, 263 (1986), that a "grand jury is not bound to indict in every case where a conviction can be obtained." That statement, however, which is not essential to the holding in that case, is in tension with the historical evidence, which indicates that grand juries traditionally have been expected to act in accordance with the law and to indict whenever the evidence establishes probable cause. See U.S. Br. 26-29, 30-31. Respondents do not address, much less refute, that historical evidence, which includes grand jury charges by earlier members of this Court instructing that the grand jury had a "duty" to indict whenever the evidence was sufficient.

To the contrary, respondents' own historical sources agree that the grand jury's role is to protect the "[i]nnocent," not to protect persons when there is probable cause to charge a crime. Br. 28 (quoting *English Liberties, or the Free-born Subject's Inheritance* 252 (Henry Care ed., 4th ed. 1719)); Br. 30 (quoting statement at Massachusetts ratifying convention). Respondents also point to a handful of politically sensitive cases in which grand juries declined to indict opponents of the Crown. See Br. 28 n.9, 29 n.10. At most, however, those cases stand for the proposition that grand juries, like petit juries, have "the power * * * to 'nullify' or exercise a power of lenity," as distinguished from "a right or something that a judge should encourage or permit if it is within his authority to prevent." *United States* v. *Thomas*, 116 F.3d 606, 615 (2d Cir. 1997).[8]

[8] The three cases specifically identified by respondents—the cases of the Earl of Shaftesbury and Stephen Colledge in 17th century England and the case of John Peter Zenger in colonial America—have historically been viewed as examples of grand jury independence. But it is not clear that those cases are also examples of grand jury nullification, *i.e.*, a decision not to charge even when probable cause exists. The grand juries in those cases may simply have been doing their duty by refusing to indict innocent persons, despite pressure to do so from the Crown. See Leroy D. Clark, *The Grand Jury* 11 (1934) (observing that the Shaftesbury and Colledge cases "appear on the surface" to be ones in which "citizens sitting on the grand jury protected political enemies of the Crown from unfounded charges brought by a hostile government," although "[i]t is possible * * * that under the law at the time there was some basis for the charges"); *id.* at 18 (observing that the Zenger case "seem[s] to have been [an] arbitrary and calculated attempt[] to harass and silence the political opposition," although "it is possible that [Zenger] had technically violated British law as it stood at that time").

4. Respondents acknowledge (Br. 31) that the Fifth Amendment right to grand jury indictment, unlike the Sixth Amendment right to trial by a petit jury, has not been extended to the States through the Fourteenth Amendment as an essential component of a fair criminal proceeding. But respondents attempt to avoid the logical implication of the Court's different treatment of those two rights: that, if a district court's reliance on a fact not found by the petit jury is not so fundamental an error as to require reversal without regard to prejudice, then neither is a district court's reliance on a fact not found by the grand jury. Respondents quote (Br. 31) the Court's observation that, when a State has chosen to use the grand jury to initiate criminal prosecutions, the grand jury is "a central component of the criminal justice process." *Campbell* v. *Louisiana*, 523 U.S. 392, 398 (1998). But such observations provide no basis for placing the grand jury on a higher plane than the petit jury, which is similarly central to the criminal justice process, as the Court reaffirmed in *Apprendi*.

Respondents also contend (Br. 32) that, even in a State that proceeds by information, an error such as the one here would "violate[] due process and require[] reversal." The case on which respondents rely—*Cole* v. *Arkansas*, 333 U.S. 196 (1948)—is quite different from this case. In *Cole*, the information appeared to charge a violation of Section 2 of a

state statute, and the defendants were tried and convicted under Section 2. See *id.* at 198-200. But the state supreme court affirmed the convictions as if the information had charged a violation of Section 1, which stated a "substantially different" offense. *Id.* at 202; see *id.* at 200. In reversing the convictions, the Court explained that, even assuming that the state supreme court correctly understood the information to charge a violation of Section 1, the defendants had been deprived of their due process right to "notice of the specific charge" and "a chance to be heard in a trial of the issues raised by that charge." *Id.* at 201. *Cole* thus involved an error that was recognized to have been prejudicial to the defendants. *Cole* does not speak to a case in which, although the trial court relied on a fact not alleged in the indictment or information, the defendant had notice that the fact was at issue and a meaningful opportunity to contest it. Consequently, *Cole* does not support a rule of automatic reversal for errors of the sort here.[9]

5. Respondents further maintain (Br. 35) that this case involves an additional structural error of "having a sentencing judge rather than a petit jury decide an element of the offense under the preponderance of the evidence standard." But that is precisely the sort of error that *Neder* subjects to harmless-error analysis (and *Johnson* to plain-error analysis). As explained above (at 9), although respondents seize on the fact that the district court in *Neder* found the materiality element under the reasonable doubt stan-

[9] Nor does *Dunn* v. *United States*, 442 U.S. 100 (1979), on which respondents also rely (Br. 32-33), support such a rule. In *Dunn*, the defendant was indicted, tried, and convicted for making a false statement on one date. The court of appeals affirmed the conviction based on a different false statement on a different date. This Court reversed on the ground that the defendant had been denied his due process "right to be heard on the specific charges of which he is accused." *Id.* at 106. A defendant is not deprived of that right when the district court relies on a fact not alleged in the indictment, provided that the defendant otherwise has notice that the fact is at issue and an opportunity to contest it.

dard, that fact was not essential to the holding in the case. The courts of appeals, applying *Neder*, have held that a failure to submit a sentence-enhancing fact, such as drug quantity, to the petit jury is subject to harmless-error analysis, without regard to the standard of proof under which the district court found that fact. See, *e.g.*, *United States* v. *Vazquez*, 271 F.3d 93, 103-105 (3d Cir. 2001) (en banc) (relying on *Neder* to hold that failure to submit drug quantity to the jury "is not a structural defect" and does not "affect substantial rights" where the defendant's "sentence would have been the same had the jury made the drug quantity finding"), petition for cert. pending, No. 01-9014 (filed Mar. 8, 2002).[10]

III. THE ERROR IN THIS CASE DOES NOT WARRANT REVERSAL UNDER THE HARMLESS-ERROR OR PLAIN-ERROR STANDARD

Respondents do not dispute that there was overwhelming and uncontrovertible evidence that their drug conspiracy offense involved at least 50 grams of cocaine base, the threshold quantity necessary to trigger a sentence of up to life imprisonment under 21 U.S.C. 841(b)(1)(A)(iii). Nor do respondents offer any plausible argument that they lacked notice that drug quantity, whether or not charged in the

[10] Respondents, joined by their amici, contend (*e.g.*, Br. 32) that drug quantity is an element of an offense under Section 841 and Section 846, and thus that the superseding indictment failed to state the particular Section 846 offense for which they were sentenced. It makes no difference to the analysis in this case, however, whether drug quantity is viewed as an element of an aggravated offense under Section 841 and Section 846 or as a sentencing factor subject to the constitutional constraints of *Apprendi*. Cf. *Neder*, 527 U.S. at 8-15 (holding that harmless-error analysis applies where jury instructions did not charge complete offense); *Johnson*, 520 U.S. at 469-470 (same with respect to plain-error analysis). And there is no doubt, contrary to amici's submission, that Section 841(b) can constitutionally be implemented in accordance with *Apprendi*, regardless of how it is construed. See, *e.g.*, *United States* v. *Buckland*, 277 F.3d 1173 (9th Cir. 2002) (en banc).

indictment, was a fact that would affect their statutory maximum sentence. Yet, respondents contend that, even under the harmless-error or plain-error standard, their sentences warrant reversal. That contention is incorrect.

1. Respondents argue that the error in this case necessarily "affects substantial rights," and thus required reversal under the harmless-error standard, because the error, if corrected, would result in a reduction in their sentences. Br. 38-39; see Br. 43-44 (similar argument with respect to plain-error standard). But it is almost invariably the case that, if an error in a criminal proceeding is found harmless, the defendant will remain subject to a conviction or sentence, or both, to which he would not be subject if the judgment were reversed. The relevant question is whether, if the defendant had been accorded the procedural protections that were erroneously denied, the outcome would have been the same. If so, the error is harmless.

Here, if the prosecutor, the grand jury, and the district court had not been operating on the erroneous (but prevailing) understanding that drug quantity did not have to be alleged in the indictment to permit an enhanced sentence, respondents would have received the same sentences that they actually received. U.S. Br. 44-48. It is clear, beyond a reasonable doubt, that the grand jury, if asked, would have found probable cause that respondents' offense involved the requisite drug quantity, and that respondents were on notice that drug quantity could affect their sentence.[11]

2. Respondents assert (Br. 39-41) that they lacked notice that the government would seek an enhanced sentence

[11] Contrary to respondents' assumption (Br. 44), the reviewing court's harmless-error or plain-error analysis would appropriately consider the entire record, including the evidence presented at trial and sentencing. See *e.g.*, *United States* v. *Mechanik*, 475 U.S. 66 (1986); cf. *Vonn*, 122 S. Ct. at 1055 (reviewing court should consider entire record, not merely record of plea proceeding, to assess effect of violation of Federal Rule of Criminal Procedure 11).

under 21 U.S.C. 841(b) based on the quantity of drugs involved in their drug conspiracy offense. That claim is without merit. Before this Court's decision in *Apprendi*, the courts of appeals uniformly treated drug quantity as a sentencing factor that did not have to be alleged in the indictment or proved to the petit jury beyond a reasonable doubt. U.S. Br. 15, 47; *e.g.*, *United States* v. *Dorlouis*, 107 F.3d 248, 252 (4th Cir.), cert. denied, 521 U.S. 1126 (1997). Accordingly, respondents, like other defendants who were indicted, convicted, and sentenced before *Apprendi*, could not reasonably have assumed, based on the omission of drug quantity from the superseding indictment, that the government intended to limit its proof to establishing quantities of drugs that would support a sentence within the lowest statutory maximum for cocaine and cocaine base.

In this case, moreover, the superseding indictment made clear that the government had not, as respondents assert (Br. 40), "abandoned" proof that the conspiracy involved quantities of cocaine and cocaine base that would subject them to enhanced sentences. In light of the superseding indictment's detailed description of a multi-level drug trafficking conspiracy that maintained "stash houses" and employed numerous individuals to distribute drugs around the clock for a period of almost two years and its reference to transportation and delivery of "kilogram quantities of cocaine" (see U.S. Br. 46; J.A. 60-62), respondents' suggestion that they were misled by the absence of a drug quantity allegation into believing that the government intended to forgo proof of the threshold drug quantities required for enhanced sentences is incredible. If respondents were at all surprised at being sentenced under 21 U.S.C. 841(b)(1)(A)(iii), one would expect them to have expressed that surprise to the district court. But they did not.[12]

[12] The government mistakenly stated that at respondents' arraignments on both indictments, they were informed that the maximum penalty for the offense was life imprisonment. Pet 2; U.S. Br. 2 (citing Gov't C.A.

3. Respondents contend (Br. 41) that the plain-error standard is inapplicable in this case because they "objected to the quantity of drugs" at sentencing. Critically, however, respondents made no objection in the district court to being sentenced based on a quantity of drugs that was not alleged in the indictment (or proved to the petit jury beyond a reasonable doubt). Instead, respondents' sentencing objections merely contested the presentence reports' calculation of the quantity of drugs attributable to them. That did not preserve the constitutional claims that they advance here. See, *e.g.*, *United States* v. *Candelario*, 240 F.3d 1300, 1304 & n.4 (11th Cir. 2001) ("a defendant's objection to the quantity of drugs that the Government attributes to him is not, on its own, a constitutional objection"), cert. denied, 533 U.S. 922 (2001).

Moreover, respondents' sentencing objections did not challenge the relevant factual determination: that their conspiracy offense involved at least 50 grams of cocaine base, a sufficient quantity to subject them to a maximum sentence of life imprisonment under 21 U.S.C. 841(b)(1)(A)(iii). As the

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Br. 45). The arraignments were not transcribed, and the government has recently listened to the tapes of the arraignments, which do not reflect that advice about penalties was provided. The tapes of the detention hearings for several respondents, however, show that they were informed after the superseding indictment that conviction would subject them to a maximum of life imprisonment or other enhanced penalties authorized by 21 U.S.C. 841(b)(1)(A). See L. Thomas Detention Hearing (6/8/98) (defense counsel states that he understands that Thomas is subject to maximum sentence of life imprisonment and mandatory minimum sentence of ten years, and that the case involves "allegations of multi-kilograms of crack cocaine being distributed"); L. Cotton Detention Hearing (7/16/98) (prosecutor states that Cotton was responsible for more than 1 1/2 kilograms of crack cocaine and 15 to 30 kilograms of powder cocaine, and that he is "looking at a life sentence" under the Guidelines); S. Hall, Jr., Detention Hearing (4/17/98) (prosecutor states that Stanley Hall, Jr., is likely to receive life sentence under the Guidelines because of quantity of crack cocaine involved in offense); Matilda Hall Detention Hearing (8/10/98) (prosecutor notes that Matilda Hall is facing mandatory minimum sentence of ten years).

government explained at the petition stage (U.S. Reply Br. 4 & n.2), respondents merely disputed the presentence reports' conclusion that their base offense level under the Sentencing Guidelines was 38, the level applicable to offenses involving at least 1.5 kilograms of cocaine base, and argued that the evidence would only support offense levels of 32, 34, or 36, each of which entails responsibility for at least 50 grams of cocaine base.

Respondents also seek (Br. 41-42) to avoid the application of the plain-error standard on the ground that, because *Apprendi* was not decided until after their trial, they could not be accused of deliberately failing to object in the district court in the hope of obtaining reversal on appeal. In *Johnson*, however, the Court made clear that plain-error review applies in all cases involving a forfeited error, not just those in which the defendant's failure to object might have been a trial tactic. Like this case, *Johnson* involved an intervening change in the law, so that "the law at the time of trial was settled and clearly contrary to the law at the time of appeal," 520 U.S. at 468, but the Court nonetheless applied plain-error analysis.

4. Respondents assert (Br. 43-47) that, even if the plain-error standard applies in this case, the imposition of an enhanced sentence based on a fact not alleged in the indictment always "affect[s] substantial rights" or "seriously affect[s] the fairness, integrity, or public reputation of judicial proceedings," and thus requires reversal on plain-error review. That contention rests on essentially the same arguments and cases on which respondents rely in arguing that the error is "structural" or "jurisdictional." Again, however, those arguments provide no persuasive reason for treating a district court's reliance on a fact not submitted to the grand jury, the error in this case, differently from a district court's reliance on a fact not submitted to the petit jury. *Neder* holds that the latter error does not affect substantial rights so long as the evidence was sufficiently strong that a rational

petit jury would have found the fact under the appropriate standard of proof. And *Johnson* holds that the error does not, in those circumstances, seriously affect the fairness, integrity, or public reputation of judicial proceedings. Similarly, here, if a reviewing court concludes, after an examination of the entire record, that a rational grand jury (and petit jury) would have found that respondents' offense involved at least 50 grams of cocaine base and that respondents had notice that drug quantity was at issue, the district court's imposition of an enhanced sentence based on drug quantity did not affect respondents' substantial rights or the fairness, integrity, or public reputation of judicial proceedings.[13]

* * * * *

For the foregoing reasons and those stated in our opening brief, the judgment of the court of appeals should be reversed.

Respectfully submitted.

THEODORE B. OLSON
Solicitor General

APRIL 2002

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[13] Respondents urge (Br. 48-49) this Court to defer to the court of appeals' exercise of its discretion in this case. The court of appeals, however, did not merely exercise its discretion in a single case, but also prescribed a rule of automatic reversal for all cases in which a sentence was enhanced based on a fact not alleged in the indictment. See, *e.g.*, *United States* v. *Dinnall*, 269 F.3d 418, 424 (4th Cir. 2001) (applying plain-error standard to reverse enhanced sentence imposed after guilty plea and reasoning that *Cotton* requires correction of such errors regardless of "quantum of evidence" of drug quantity). In an analogous context, this Court has required the exercise of discretion based on the entire record in the particular case. See *Johnson*, 520 U.S. at 469-470.

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IN THE SUPREME COURT OF THE UNITED STATES

UNITED STATES OF AMERICA,
PETITIONER,

v.

LEONARD COTTON, MARQUETTE HALL, LAMONT THOMAS, MATILDA HALL, JOVAN POWELL, JESUS HALL, AND STANLEY HALL, JR.,
RESPONDENTS.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF OF *AMICI CURIAE* NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AND FAMILIES AGAINST MANDATORY MINIMUMS FOUNDATION IN SUPPORT OF RESPONDENTS

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QUESTIONS PRESENTED BY *AMICI CURIAE*

1. Are the threshold amounts of controlled substances which trigger increased maximum sentences under the various subsections of 21 U.S.C. § 841(b) elements of greater and lesser offenses, or are they non-elemental sentence-enhancing facts?

2. Did *Apprendi v. New Jersey*, 530 U.S. 466 (2000), authorize the courts to interpret federal criminal statutes as allowing maximum-sentence-increasing facts previously construed on the basis of purported congressional intent as mere "sentencing factors" to be *treated* instead as if they were elements of a greater offense without finding them to *be* actual elements?

3. May a federal appellate court affirm a concededly illegal sentence under the plain error rule of Fed. R. Crim. P. 52(b), by treating as "error" not the excessive sentence but the "failure" of the prosecutor to ask the grand jury to indict for a more serious offense, so long as the facts necessary to support the sentence are found by the appeals court, although never by the jury, to be supported by evidence admitted at trial and/or at the time of sentencing?

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BRIEF OF *AMICI CURIAE* NACDL AND FAMM IN SUPPORT OF RESPONDENTS

INTERESTS OF AMICI CURIAE

The National Association of Criminal Defense Lawyers ("NACDL"), a nonprofit corporation, is the only national bar association working in the interest of public and private criminal defense attorneys and their clients. NACDL was founded in 1958 to ensure justice and due process for persons accused of crimes; foster the integrity, independence and expertise of the criminal defense profession; and promote the proper and fair administration of justice.[1] NACDL has 10,000 members nationwide -- joined by 80 state and local affiliate organizations with 28,000 members -- including private criminal defense lawyers, public defenders and law professors committed to preserving fairness within America's criminal justice system. The American Bar Association recognizes NACDL as an affiliate organization and awards it full representation in its House of Delegates.

Families Against Mandatory Minimums Foundation ("FAMM") is a nonprofit, nonpartisan organization with 22,000 members and 30 Chapters nationwide. FAMM conducts research, promotes advocacy and educates the public regarding the excessive cost of mandatory minimum sentencing. The cost is not limited to public expenditures but includes the perpetuation of unwarranted sentencing disparities, disproportionate sentences, and the transfer of the sentencing function from the judiciary to the prosecution. FAMM does not argue that crime should go unpunished, but that the punishment should fit the crime and the culpability of the offender. FAMM therefore has a special interest in ensuring that sentencing law and practice result in just outcomes, and to the extent that mandatory sentences are required by law, that they be arrived at in a manner consistent with statutory and constitutional mandates.

Amici have an interest in this case because the issues presented—both expressly and implicitly—are fundamental to proper constitutional government.

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[1]No counsel for any party has authored this brief in whole or in part, and no person or entity, other than NACDL and FAMM, made any monetary contribution to its preparation or submission. *See* Rule 37.6, Sup. Ct. Rules. The parties have consented to the filing of this brief, and letters of consent have been lodged with the Clerk of the Court. Rule 37.3(a).

SUMMARY OF ARGUMENT

1. After *McMillan v. Pennsylvania*, 477 U.S. 79 (1986), and before *Apprendi v. New Jersey*, 530 U.S. 466 (2000), the courts of appeals erroneously attributed to Congress an intent to establish drug amount in 21 U.S.C. § 841 as a sentence-enhancing fact. Petitioner affirmatively relies upon, but does not defend this uniform misinterpretation of 21 U.S.C. § 841. To the contrary, a proper application of the principles of statutory construction demonstrates that Congress intended drug amount (and drug type) to be elements of various greater and lesser drug offenses fully defined in 21 U.S.C. § 841(b).[2]

In *Almendarez-Torres v. United States*, 523 U.S. 224, 234, 235-36 (1998), this Court established a painstaking methodology for statutory inquiry into whether, without expressly saying so, Congress made an operative fact in a criminal statute only a sentence enhancer and not an element.[3] While *Almendarez-Torres* derived its methodology mainly from the circuits' § 841 precedents, the *Almendarez-Torres* statutory analysis, properly applied to § 841 itself, establishes that Congress intended drug types and amounts to be offense elements. The prevailing, yet incorrect, interpretation by the courts of appeals arose as a consequence of inappropriate judicial reliance upon

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[2]The statute conventionally known as 21 U.S.C. § 841 (1994 ed. & Supp. IV 1998) is properly referenced as the Controlled Substances Act of 1970, Pub. L. 91-513, Title II, § 401, Oct. 27, 1970, 84 Stat. 1260, as amended (the "CSA"). The distinction is pertinent to the argument. *See, e.g., United States v. Vazquez*, 271 F.3d 93, 111-12 (3d Cir. 2001), *petition for cert. pending*, No. 01-9014 (docketed March 15, 2002). Except where essential, *Amici* employ the conventional reference.

[3]In addressing the "constitutionally novel and elusive distinction between 'elements' and 'sentencing factors,'" *Apprendi*, 530 U.S. at 494, the Court defined "sentencing factors" as limited to operative facts that support a sentence within the otherwise-set statutory range, as opposed to "the term 'sentence enhancement,'" which "describe[d] an increase beyond the maximum authorized statutory sentence." *Id.* at 494 n.19. So defined, the term "sentence enhancement" is not grammatically or conceptually parallel to the terms "elements" and "sentencing factors." Thus, *amici* follow petitioner's convention of using the term "sentence-enhancing fact" to refer to a maximum-extending operative fact, congressionally designated for judicial determination under a preponderance-of-the-evidence standard. *See, e.g.*, Pet. Br. at 42.

McMillan v. Pennsylvania in construction of § 841. The United States managed to secure an erroneous unanimity in the lower courts, without this Court ever reviewing the issue. The Court must reject that consensus and enforce Congressional intent in this case.

2. Petitioner attempts to avoid this statutory issue. Conceding that the sentence-enhancing interpretation of § 841 raises an issue under *Apprendi*, petitioner does not offer a saving construction of the statute. Rather, petitioner relies upon what would be a new mode of constitutional adjudication, an invention that authorizes courts to override the presupposed Congressional intent to create sentencing factors, thus allowing drug type and amount to be treated as offense elements. The Court must reject this approach as a judicial usurpation of legislative power.

The Ninth Circuit, sitting *en banc*, has recently rejected petitioner's approach, holding instead that Congress intentionally left to the courts the determination of the burden of proof and the fact-finder with respect to drug type and amount in § 841. *United States v. Buckland*, 277 F.3d 1173 (2002). The Ninth Circuit's analysis concedes that drug amount was *not* intended as a sentence-enhancing fact for judicial determination. After rejecting the main ground upon which drug type and amount had been construed as a sentence-enhancing fact, this analysis never explains why drug type and amount should be anything other than offense elements. This approach fails, because it is utterly unsupported by the *Almendarez-Torres* analysis. Moreover, if Congress had the specific intent to be vague the Ninth Circuit has attributed to it, the statute does not satisfy constitutional constraints placed upon legislation enacting federal criminal statutes.

3. Because Congress intended drug amounts to be offense elements of greater and lesser offenses under § 841(b)(1), petitioner's arguments in favor of a rule of harmlessness for "omission from a federal indictment of a fact that enhances the statutory maximum sentence," Pet. Br. at (I), must fail. The difference between what should have happened below under the proper construction of § 841 and what did happen below shows that petitioner's reliance upon *Neder v. United States*, 527 U.S. 1 (1999), is misplaced with respect to both the omitted instruction to the petit jury and the omitted allegation in the indictment. In *Neder*, an erroneous interpretation during trial of materiality as a "legal element"

merely resulted in the judge rather than the jury finding materiality. To affirm here, not only would a judge have to make a finding that the Constitution assigns to the jury, the finding would be on a fact not charged, found at the wrong stage of the proceedings and on a record created for a different purpose and under a different standard.

Here, the Court cannot reverse the judgment vacating respondents' life sentences without violating due process and validating a structural error. The erroneous statutory interpretation prevailing at trial resulted in their convictions for a lesser-included drug offense, but they were sentenced for an uncharged and untried greater-inclusive offense. Moreover, once drug amount is properly construed as an element, it becomes clear that respondents were denied not only a trial by jury, but also the benefit of the beyond-a-reasonable-doubt standard of proof, and notice and the opportunity to be heard under that standard of proof.

The judgment of the court below should therefore be affirmed.

ARGUMENT

Contrary to the underlying but undefended premise of petitioner's argument, it is not possible to analyze whether "error" is "plain," without first carefully identifying what legal "error" was supposedly committed, by whom, and when. Petitioner concedes an error in the sentence, Pet. Br. 16 (district court's imposition of sentence exceeding 20 years on each respondent conceded to be "error"), but bases its arguments on the premise that the error consists in an omission from the indictment. Pet. Br. 17 (identifying error in the case as "omission of an element or sentence-enhancing fact from an indictment," for purpose of applying Rule 52). Moreover, petitioner repeatedly suggests that the error either was or resulted from its own failure to ask the grand jury to allege the threshold amounts of cocaine and cocaine base in the indictment. Pet. Br. 12, 23, 25-26, 45-46. Petitioner never attempts to explain why its failure should be attributed to respondents (or even the district court). Petitioner never explains why the omission of drug amounts from the indictment is anything but its own strategic blunder, as seen in hindsight, or how that omission is an "error" in any sense pertinent to analysis under Fed. R. Crim. P. 52. The only "error" properly under consideration in this case is the

imposition of illegal sentences. The question is whether that error may be excused.

By first construing the statute to determine Congress' intent in including in 21 U.S.C. §841 specifications of various drug amounts – an exercise which this Court has never previously undertaken – the Court will greatly simplify the issues necessary to decide this case. Moreover, the Court can then decide the questions presented standing upon the bedrock of legal analysis rather than the loose and shifting sands of real or apparent concessions of "error"offered for the sole purpose of asking the Court to hold these ill-defined errors to be "harmless" and "not plain error" under Fed. R. Crim. P. 52.

Petitioner appears to suggest that any distinction between an element and a "sentence-enhancing fact" is, after *Apprendi*, immaterial for purposes of the application of Fed. R. Crim. P. 52. Pet. Br. at 16 & n.4, 17, 19, 30-31. Furthermore, petitioner argues for a rule of harmlessness applicable to both sentence-enhancing facts and elements. Pet. Br. at 36-37; *see also* Pet. at 20-22; Reply Br. on Pet. at 2-3 & n.1. Yet, Petitioner frames and argues the issues *necessarily* relying upon the assumption that drug amount in 21 U.S.C. § 841 is a sentence-enhancing fact and not an element of the offense.[4] *See, e.g.*, Pet. Br. at (I), 12, 22-24, 38-42.

Contrary to this assumption, *amici* submit that the Court, without any need to rely upon the doctrine of constitutional doubt and irrespective of the rule in *Apprendi v. New Jersey*, 530 U.S. 466 (2000), must conclude that Congress intended drug amounts (and drug types) in 21 U.S.C. § 841 as offense elements always, for all purposes. *Accord Vazquez*, 271 F.3d at 107-15 (Becker, Ch. J., concurring); *Buckland*, 277 F.3d at

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[4]Petitioner nowhere concedes that drug amount in § 841 *is* a congressionally defined offense element. Petitioner's assertion that the issue is the same whether drug amount is "viewed as an 'element' . . . or as a sentencing factor subject to . . . *Apprendi*," Pet. Br. at 16 n.4, plays on verbal variations among courts applying the same novel mode of constitutional analysis that supposedly permits courts to *contradict* a presupposed congressional intent. *See infra*, Part II. Petitioner's claim that statutory construction is unnecessary relies on that analysis and is merely a restatement of its strategic (but legally and factually dubious) concession that the Grand Jury Clause applies to sentence-enhancing facts (other than recidivism apparently). *Cf. Almendarez-Torres v. United States*, 523 U.S. 224 (1998) (offense elements must be alleged, but *constitutionally valid* sentence-enhancing facts need not be alleged).

1187-95 (Hug, J.). That established, the Court cannot apply Fed. R. Crim. P. 52(b) in the manner Petitioner advocates.

I. Congress Created Drug Type and Amount in 21 U.S.C. § 841 as Offense Elements

Petitioner relies, for its *necessary* contention that drug amount is a sentence-enhancing fact rather than an element, upon the unanimous pre-*Apprendi* cases in the courts of appeals definitively construing drug amount (and, usually, drug type) as sentence-enhancing facts. Pet. Br. at 15 (citing *United States v. Sanchez*, 269 F.3d 1250, 1266-67 & n.30 (11th Cir. 2001), *petition for cert. pending*, No. 01-8100 (Docketed Jan. 15, 2002)). After the sentence-enhancing interpretation of drug type and threshold drug amounts became settled precedent in the courts of appeals, this Court decided *Almendarez-Torres v. United States*, 523 U.S. 224 (1998). In that case, the Court established a painstaking methodology for statutory inquiry into whether, without expressly saying so, Congress created a "sentencing factor" rather than an offense element. 523 U.S. at 228-39. A court must "look to the statute's language, structure, subject matter, context and history—factors that typically help courts determine a statute's objectives and thereby illuminate its text." *Almendarez-Torres*, 523 U.S. at 228; *see also Carter v. United States*, 530 U.S. 255, 272-74 (2000); *Castillo v. United States*, 530 U.S. 120 (2000); *Jones v. United States*, 526 U.S. 227, 232-39 (1999). *Almendarez-Torres* adopted much of its methodology from the lower court cases construing drug type and amount as sentence-enhancing facts. 523 U.S. at 234-36. It is, then, no small irony that the *Almendarez-Torres* analysis reveals, for the reasons set forth below, that the lower courts' sentence-enhancing fact interpretation of § 841 is wholly without foundation.

1. "Congress's failure to include drug type and quantity within its express sentence-enhancement provisions indicates its intent to treat these factors as elements of a crime." *Vazquez*, 271 F.3d at 111 (Becker, Ch.J., concurring in judgment); *cf. Jones*, 526 U.S. at 233; *Almendarez-Torres*, 523 U.S. at 249 (Scalia, J., dissenting). When Congress intended sentence-enhancing factors in the original Controlled Substances Act ("CSA") of 1970, it expressly said so. Congress made prior convictions a basis for increasing the statutory maximum punishment, CSA § 401(b). Congress

then unambiguously and expressly provided that recidivism was to be determined "after conviction but before pronouncement of sentence," 21 U.S.C. § 851(b) (1994 ed.), in a hearing "before the court without a jury," albeit with the fact to be determined "beyond a reasonable doubt." *Id.* § 851(c)(1). *See also* 21 U.S.C. § 849 (1970 ed.) (repealed).

In contrast, the CSA of 1970 did not include any similar provision to create sentence-enhancing factors with respect to drug type (and no drug amounts appeared). Since drug type and amount and prior convictions all appear in § 841(b), the exclusion from § 851 of drug type (and later, drug amount) demonstrates that Congress chose to treat only prior convictions as sentence-enhancing facts, with all other operative facts remaining elements. *Gozlon-Peretz v. United States*, 498 U.S. 395, 404 (1990) (Congress presumed in CSA to act intentionally and purposely in disparate inclusion or exclusion).[5]

2. The language of the Section 841 (entitled "Prohibited acts A—Penalties" in the Statutes at Large) shows that subsection 841(b), not subsection 841(a), creates criminal offenses. It defines those offenses by the elements of drug type and amount.

Subsection (a) makes certain acts *unlawful* but is incomplete as a penal statute because it does not provide punishment. *Cf. Jones*, 526 U.S. at 233-34 (statutory description of "some very obnoxious behavior" alone fails to state a crime because it neither concluded with "shall be guilty of a felony" nor "shall be punished [or 'fined and imprisoned,' etc.]"). It is black letter law that a prohibition

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[5]In its petition, the United States argued that a doctrine of harmlessness is needed to remedy omissions of essential elements due to appellate changes in law, as well as prosecutorial errors. Pet. at 21. *Amici* submit that the underlying problem is the propensity of the courts of appeals to assume that operative facts are sentence-enhancing facts in the absence of any express congressional designation of those facts as such. As the text of its express sentence-enhancing provisions shows, Congress is well aware that defining a sentence-enhancing provision requires no more than a designation of the fact, the time it is to be at issue, the decision-maker and the burden of proof. 21 U.S.C. § 851(b) (1994 ed.); 21 U.S.C. § 849 (1970 ed.) (repealed). Amici respectfully submit that, in lieu of encouraging the *Almendarez-Torres*' implied sentence-enhancing fact analysis by extending the harmless error doctrines to validate errors, the Court should overrule *Almendarez-Torres* in favor of a plain-statement rule applicable to sentence-enhancement provisions.

without a specified penalty creates no crime. 1 Wayne R. LaFave & Austin W. Scott, *Substantive Criminal Law* § 1.2(d), at 12-13 (1986); *see United States v. Evans*, 333 U.S. 483, 486, 490-99 (1948). Rather, as the Court recently termed it, subsection 841(a) creates a "statutory prohibition," subject to both civil and criminal enforcement. *United States v. Oakland Cannabis Buyers' Cooperative*, 532 U.S. 483, 499 (2001); *see also id.* at 486, 494 n.7.

That § 841(a) merely creates a "statutory prohibition" is confirmed in § 842, a parallel provision of the CSA ("Prohibited acts B—Penalties" in the Statutes at Large). It, too, makes certain acts "unlawful." 21 U.S.C. § 842(a). A violation of § 842(a), however, "does not constitute a crime" except as provided in § 842(c)(2). 21 U.S.C. § 842(a), (c)(3) (1994 ed.). *See United States v. Richardson*, 529 U.S. 813, 819 (1999). As with § 842(a), the act provides criminal offenses for violations of § 841(a); in the case of § 841, these are in § 841(b)(1-3).[6]

Subsection (b), in contrast to § 841(a) is complete as a criminal statute. In its unnumbered preamble, subsection (b) uses the active voice ("any person who violates subsection (a) ...."), which the Court deems typical offense-defining language. *Carter*, 530 U.S. at 272-73. Subsection (b) expressly incorporates an act in violation of subsection (a) as an element. The "violates subsection (a)" language also appears in other sections of the CSA, as amended. 21 U.S.C. §§ 849, 859-61. These sections have been consistently construed to define offenses, not sentencing provisions. *See, e.g., United States v. Chandler*, 125 F.3d 892, 896 (5th Cir. 1997) (§ 860, which expressly incorporates a violation of § 841(a), just as does § 841(b), is greater-inclusive offense of §

[6]Judge Luttig, concurring in the result in *United States v. Promise*, 255 F.3d 150, 170-72 (4th Cir. 2001) (en banc), *petition for cert. pending*, No. 01-6398 (docketed September 20, 2001), reads § 841(a) as a complete criminal offense with a statutory maximum of life imprisonment. Not only is such a reading refuted because the "shall be unlawful" language used in § 842(a) expressly does not even create a crime, the reading is ahistorical. Subsection (a) has not been altered since 1970, when the maximum sentence of imprisonment under *any* set of facts for its violation was 30 years. *See* 21 U.S.C. § 841(b)(1)(A) (1970 ed.) (as amended and modified, currently §841(b)(1)(C); *cf. Vazquez*, 271 F.3d at 114 (Becker, Ch J., concurring) (Congress could not have structured § 841 to comply with *Apprendi*).

841); *United States v. McQuilken*, 78 F.3d 105, 108 (3d Cir. 1996) (same).

Subsection (b), unlike subsection (a), contains punishment-introducing language, followed by punishment. 21 U.S.C. § 841(b). In fact, with respect to each subparagraph of paragraph (b)(1), a punishment-introducing clause appears twice, in the unnumbered preamble following "violates subsection (a)" and also following the specification of covered drug types and amounts. *See, e.g., id.* § 841(b)(1)(A). The two punishment-introducing clauses appear in a single sentence that reads like a traditionally defined crime. For example:

> [A]ny person who violates subsection (a) of this section shall be sentenced as follows: ... (1)(A) In the case of a violation of subsection (a) of this section involving— (ii) 5 kilograms or more of a mixture or substance containing a detectible amount of [cocaine]; . . . such person shall be sentenced to a term of imprisonment which may not be less than 10 years or more than life . . . a fine not to exceed the greater of that authorized by title 18 or $4,000,000 if the defendant is an individual ..., or both.

21 U.S.C. § 841(b)(1)(C). As with the weapon type in *Castillo*, drug type and amount appear in a single sentence with other elements, separate from the following complete sentences that address traditional sentencing concerns.[7] "These structural features strongly suggest that the basic job of the entire first sentence is the definition of crimes and the role of the remaining ... sentences is the description of factors (such as recidivism) that ordinarily pertain only to sentencing." *Castillo*, 530 U.S. at 125.[8]

[7]Like drug type and amount, the operative fact of causation of death or bodily injury appears in the primary offense-defining sentence when recidivism is not involved. As held in *Jones*, 526 U.S. at 236-37, death and injury-causation are traditional elements, not traditional sentencing factors. In § 841(b)(1)(A), following the primary-offense defining sentence, "shall be sentenced" appears three times in two sentences defining the consequences of "such a violation" (referring to the primary sentence) in the presence of recidivism and recidivism combined with death or bodily injury.

[8]Paragraph 841(b)(5), in typical offense defining language, increases maximum fines for "[a]ny person who violates subsection (a) of this section by cultivating a controlled substance on Federal property." 21 U.S.C. § 841(b)(5). Congress' using offense creating language to raise fines

Reading subsection (b) as the offense defining provision, it can be seen that Congress created an "efficient double-axis prosecution scheme, under which each act in violation of what is now § 841(a) (manufacture, distribute, etc) could be prosecuted with respect to different drug types." *Vazquez*, 271 F.3d at 109 (Becker, Ch. J.). Such a reading is consistent with pre-CSA federal drug laws, under which offense elements were narrowly defined so that offenses could be cumulated. *Blockburger v. United States*, 284 U.S. 299, 302 (1932) (each sale is a crime); *Normandale v. United States*, 201 F.2d 463, 464 (5th Cir. 1953) (each drug is a separate element). In fact, before *McMillan v. Pennsylvania*, 477 U.S. 79 (1986), the court below employed this double axis prosecution scheme under the CSA. *United States v. Grandison*, 783 F.2d 1152, 1156 (4th Cir. 1986) (possession of each scheduled substance is a separate offense); *United States v. Elliot*, 849 F.2d 886, 888-90 (4th Cir. 1988) (each distribution is separate offense); *cf. Promise*, 255 F.3d at 175 (Luttig, J., concurring in judgment) (disputing "double-axis" thesis by doubting Congress created 350 different offenses).[9] The idea that § 841(a) contains all offense elements (and that drug type is an intended sentencing factor) is simply inconsistent with Congress' intent to unify federal drug laws in a single statute without relaxing their preexisting punitive force. *Vazquez*, 271 F.3d at 109; *United States v. Davis*, 656 F.2d 153, 156-60 (5th Cir. 1981).

To deem § 841(a)(1) the exclusive offense-creating provision, lower courts have relied on the subsection headings "Unlawful acts" and "Penalties" that appear in the United States Code. *See Sanchez*, 269 F.3d at 1263-66; *Promise*, 255 F.3d at 170-72 (Luttig, J., concurring in judgment). This reliance is wholly baseless.

The Act Congress passed does not contain those headings. Controlled Substances Act of 1970, Pub. L. 91-513, Title II, §§ 401-10, Oct. 27, 1970, *reprinted in* Stat.L. 1466-68, 91st Cong., 2d Sess.; *see also* 116 Cong. Rec. 33624-25 (1970). The Office

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petitioner contends are fixed entirely by "sentencing factors" undercuts petitioner's interpretation of § 841(b)(1)-(3) as containing sentencing factors, not elements.

9 Presumably, Judge Luttig believes Congress created "some 350" *sentencing factors* without an express word saying so.

of the Federal Register, National Archives and Records Services added a reference to "penalties" as a margin note to the Statutes at Large. 84 Stat. 1260; *see* 44 U.S.C. § 729 (1994 ed.). Only the bill number and date is required by law, *see id.*, and such margin notes are mere finding tools for users' convenience. *Cf. United States v. Detroit Lumber Co.*, 200 U.S. 321, 337 (1906) (court syllabus). When the CSA was reproduced in the United States Code, the editors converted the margin notes into subsection headings. *See generally* 2 U.S.C. §§ 285a, 285b(1) & (3) (1994 ed.). Because Title 21, unlike some others, has not itself been enacted into law, the Statutes at Large, not the United States Code, are the authoritative source of law. *Id.* § 285b(3); 2 U.S.C., Supp. IV, at vii (1998). Congress did not enact these headings in the 1984 or 1986 amendments. Thus, no subheadings exist in the controlling statute.[10]

3. Until 1986, the courts of appeals correctly understood that Congress defined a variety of related drug offenses in § 841(b). For at least 16 years after Congress passed the CSA of 1970, the courts of appeals generally treated drug type, and when it was added as an operative fact, drug amount, as elements of a § 841 offense. See, *e.g.*, *United States v. Bazan*, 807 F.2d 1200, 1206 (5th Cir. 1986).[11] For example, in 1984, the court in *United States v. Webster*, 750 F.2d 307 (5th Cir.

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[10]In the face of the legislative record and petitioner's concession in that case that the headings could not be relied upon, the Eleventh Circuit nevertheless grounded its conclusion that "§ 841 is bifurcated, providing a clear dichotomy of offense elements and sentencing factors," *Sanchez*, 269 F.3d at 1265, on *nothing but* these non-existent headings. *Id.* at 1263-65. Such headings are inaccurate as indicators of where elements are defined. *See, e.g.*, 21 U.S.C. § 842(c)(2)(A) (1994 ed.) (offense defined under "penalties" heading); 21 U.S.C. § 848(a) (1970 ed.) (distinct crime entitled "Penalties; forfeitures"). Moreover, when it created a separate, complete offense in § 841(b)(7), Congress itself enacted a title line, "Penalties for Distribution." 110 Stat. 3807. Congress often uses "penalty" to distinguish crimes from civil prohibitions.

[11]*See also, e.g.*, *United States v. Crockett*, 812 F.2d 626, 628-29 (10th Cir. 1987); *United States v. Buishas*, 791 F.2d 1310, 1317 (7th Cir. 1986); *United States v. McHugh*, 769 F.2d 860, 868 (1st Cir. 1985); *United States v. Wright*, 742 F.2d 1215, 1220-21 (9th Cir. 1984); *United States v. Alvarez*, 735 F.2d 461, 466-68 (11th Cir. 1984); *United States v. Pope*, 561 F.2d 663, 669-70 (6th Cir. 1977); *United States v. Estell*, 539 F.2d 697, 699 (10th Cir. 1976) ("the presence and identity of the drug is the thing and ... the quantity is not important" under 1970 Act).

1984), affirmed a jury verdict and sentence for an indicted conspiracy to possess 1000 pounds or more of marijuana. The *Webster* jury, instructed on lesser included offenses relating to marijuana without regard to quantity, had convicted the defendant of the indicted amount, and the court considered that conviction binding on the court and parties. Honoring the verdict, the court rejected challenges to the sufficiency of the evidence of amount and the failure to preserve the contraband on grounds inconsistent with a reading that drug amount is merely a sentencing factor. *Id.* at 332. Moreover, the court noted that the quantity recovered need not exceed the threshold, as to any conspiracy count, if defendants had *agreed* to exceed the threshold. *Webster*, 750 F.2d at 334 n.13. *See generally Joplin Merchandise Co. v. United States*, 236 U.S. 531, 535 (1915) (object of conspiracy must be alleged in charging language of the conspiracy count). Affirming a jury verdict on such a basis is logical *only* if the Court considered marijuana amount an offense element.[12]

In 1986, this Court decided *McMillan v. Pennsylvania*, 477 U.S. 79 (1986). "[I]t is fair to say that *McMillan* began a revolution in the law regarding the definition of "'crime.'" *Apprendi*, 530 U.S. at 518 (Thomas, J., concurring). After *McMillan*, the *courts of appeals* decided that drug type and amount had become maximum-extending sentencing enhancers. E.g., *United States v. Morgan*, 835 F.2d 79, 81 (5th Cir. 1987).[13] The courts relied upon *McMillan*'s constitutional

[12]As *Webster* recognized, a drug amount actually possessed does not *ipso facto* establish a floor or a ceiling with respect to the co-conspirators' *actual agreement*. *Accord Wright*, 742 F.2d at 1220-21; 21 U.S.C. § 846. Petitioner, however, does not concede that drug amount defines the conspiratorial object. Rather, isolating the word "involving" from the offense-defining text of § 841(b), petitioner cites evidence of quantities *actually possessed*, without making the necessary connection to respondents' *actual agreement*. Pet. Br. at 43-46. Thus, with drug amount as a § 841(b)(1)(A) offense element, petitioner fails to address its accuracy arguments to the "omitted" element, properly defined.

[13]*See also, e.g., United States v. Lewis*, 113 F.3d 487, 489-92 (3d Cir. 1997); *United States v. Patrick*, 959 F.2d 991, 995 n.5 (D.C. Cir. 1992); *United States v. McCann*, 940 F.2d 1352, 1354, 1358 (10th Cir. 1991); *United States v. Sotelo-Rivera*, 931 F.2d 1317, 1319 (9th Cir. 1991); *United States v. Barnes*, 890 F.2d 545, 551 n.6 (1st Cir. 1989); *United States v. Powell*, 886 F.2d 81, 84-85 (4th Cir. 1989); *United States v. Acevedo*, 891 F.2d 607, 611 (7th Cir. 1989); *United States v. Smith*, 840 F.2d 886, 888 (11th Cir. 1988); *United States v. Wood*, 834 F.2d 1382, 1388-90 (8th Cir. 1987).

holding in conducting their statutory reconstruction of § 841. *E.g., United States v. Moreno*, 899 F.2d 465, 472-74 (6th Cir. 1990); *Powell*, 886 F.2d at 84, 85. True, *McMillan* held that an express, legislatively enacted sentencing factor predicate to mandatory minimum sentences was *permitted*. But nothing in the history of the federal drug statute shows that Congress (without saying so) *intended* to take advantage of *McMillan* and make drug type and/or amount into maximum-extending sentencing enhancers.

5. The legislative history of the CSA of 1970 shows no non-recidivist sentencing enhancers were intended in § 841. Congress expressed no intent in 1970 to make drug type a sentencing enhancer rather than an element. (Amount was statutorily irrelevant in the original CSA.) The legislative history discusses "penalties" corresponding to "violations," which is unremarkable in the context of a discussion of a penal statute. H.Rep. No. 91-1444, 91st Cong. 2d Sess. (1970), [1970] U.S. Code Cong. & Admin. News, at 4567, 4570, 4571, 4574, 4575-79, 4614, 4618. No inference that the report meant "sentence-enhancing fact" or "sentencing factor" when it said "penalty" can be drawn. The report subsection entitled "Criminal Penalties," *id.* at 4575, leads with a discussion of the new continuing criminal enterprise offense, which Congress clearly intended to be a separate offense. *See Garrett v. United States*, 471 U.S. 773, 783-84 (1980); *cf. Jones*, 526 U.S. at 237-38 (finding "unimpressive" the Government's equating of "penalty enhancement" with "sentencing factor"); *Castillo*, 530 U.S. at 128-30 (similar).[14]

The absence of any intent to make operative facts (aside from prior convictions) sentencing enhancers under § 841 is shown by the debates over sections 408 and 409 of the CSA, 21 U.S.C. § 848 (continuing criminal enterprise) and 21 U.S.C. § 849 (1970) [repealed] (dangerous special drug offender sentencing). Due to constitutional objections foreshadowing

[14]The Fifth Circuit has relied on Congress' intent to provide "maximum flexibility to the judges." *Davis*, 656 F.2d at 159. In context, the cited phrase from the legislative history refers to the elimination of almost all mandatory penalties from the CSA of 1970. When mandatory minimum sentences were reintroduced in 1986, it was precisely to remove judicial discretion by making the jury's drug type and amount findings conclusive as to minimum penalties. 132 Cong.Rec. S14301 (daily ed., Sept. 30, 1986).

Apprendi, the proposed new continuing criminal enterprise provision was explicitly changed from a sentence-enhancing provision into an offense. H. Rep. No. 91-1444, [1970] U.S. Code Cong. & Admin. News, at 4651 (additional views). When the CSA came to the House floor, the special dangerous drug offender sentencing provision was introduced, vigorously debated (again along lines foreshadowing *Apprendi*) and ultimately added to the CSA. CSA § 409; 116 Cong. Rec. 33633 (1970); 116 Cong. Rec. 33633-34 (1970); 116 Cong. Rec. 33661 (1970). Yet, even the author of the sentencing provision agreed that the traditional right to trial by jury attached to the predicate violation of the CSA. *Id.* at 33634. The lack of similar debate on § 841 confirms that Congress did not intend to change pre-CSA practice and re-designate drug type as a sentence-enhancing fact.

6. The legislative history of post-1970 amendments shows that threshold drug amount is an element. In the Infant Formula Act of 1980, Pub. L. 96-359, § 8(c)(2), Sept. 29, 1980, 94 Stat. 1260, Congress first added a threshold drug amount (at least 1000 pounds of marijuana) as an operative fact in the former § 841(b)(6), using offense-creating language similar to that later contained in subparagraphs (1)(A) and (B). Both the House and Senate Reports state, "[i]ndividuals *convicted* of trafficking in over 1,000 pounds would be subject to a maximum 15 year prison sentence and/or a maximum $125,000 fine." H. Rep. 96-936, 96th Cong. 2d Sess. 13 (1980); S. Rep. 96-916, 96th Cong. 2d Sess. 14 (1980) (emphasis added). It can be presumed that Congress used the word "convicted" advisedly and because it intended amount to be an element of the offense. *See Vazquez*, 271 F.3d at 109 (Becker, Ch.J., concurring in judgment).

In 1984, Congress adopted the former § 841(b)(1)(A). Both the Justice Department, which drafted the provision, *see* H. Doc. 98-32, 98th Cong. 1st Sess., and the Senate Report note that, except for marijuana, the prior law did not account for the important factor of the amount of the drug involved. Thus, Congress created "a new subparagraph (A) under § 841(b)(1) that would provide, for offenses involving large amounts of particularly dangerous drugs, higher penalties than those now provided under section 841." S. Rep. 98-225, 98th Cong., 1st Sess. 258 (1983). "The use of the plural 'offenses' indicates Congress's intention to create within a single statute a multitude of separate crimes depending on

drug type and quantity." *Vazquez*, 271 F.3d at 110 (Becker, Ch.J.); *cf. Promise*, 255 F.3d at 175 (Luttig, J., concurring in judgment).

In 1986, Congress, using the internal structure of subparagraph (b)(1)(A) of the 1984 amendments, created new subparagraphs (b)(1)(A) and (B) and included mandatory minimum sentences for offenses under those subparagraphs. Again, the legislative history contains no discussion referencing sentence-enhancing facts. The Government was involved in the hearings, and assured Congress that prosecutors could present evidence of drug amount passing the sufficiency of the evidence test (which applies to convictions, not sentencing), by introducing into evidence testimony about large drug transactions, rather than drugs themselves in the threshold quantities. H. Rep. 99-845, Part 1, 99th Cong., 2d Sess., at 12 (1986); *see also id.* at 19 (referring to "person convicted under" subparagraphs (b)(1)(A) & (B)); 132 Cong. Rec. S14301 (daily ed. Sept. 30, 1986) (Sen. Byrd: finding of guilt removes judicial discretion regarding mandatory minimums). *Accord Vazquez*, 271 F.3d at 110 (Becker, Ch.J.). Thus, when Congress gave § 841 the structure that it substantially retains today, Congress intended drug type and amount to be elements of § 841 offenses.[15]

7. The Justice Department initially knew Congress created drug type and amount as offense elements, and nonetheless seized upon and spread the early misinterpretations of the courts of appeals. Immediately following the 1986 amendments, the Department of Justice published its

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[15]Although the Court decided *McMillan* four months before Congress passed the 1986 amendments to § 841, nothing in the text or legislative history indicates that Congress defined drug type and amount in § 841 in reliance upon *McMillan*. *Cf. Apprendi*, 530 U.S. at 487 n.13; *see also id.* at 564 (Breyer, J., dissenting) (citing § 841(b) as an example of possible legislative reliance on *McMillan*). Rather, the language, structure and legislative history of § 841 is consistent with the long-standing tradition of treating type and amount operative facts in federal criminal statutes as offense elements for jury determination. *See* M.D. Knoll & Richard G. Singer, "Searching for the 'Tail of the Dog': Finding 'Elements' of Crimes in the Wake of *McMillan v. Pennsylvania*," 22 Seattle Univ. L.Rev. 1057 (1999). Moreover, in 1988 -- after many circuits had begun reversing course and describing § 841(b) as containing only *McMillan*-esque "sentencing factors" -- Congress amended § 841(b)(1)(A) (in the third complete sentence) to contain an internal reference to "a violation of this subparagraph," thus confirming in the text of § 841(b) itself that the offense, and not merely "sentencing factors," are found therein.

understanding of the amendments. *Handbook on the Anti-Drug Abuse Act of 1986*, at 1-9, 13-17, 20-21 (March 1987). The *1986 Handbook* repeatedly refers to *convictions* under the subparagraphs of § 841(b)(1). *Id.* at 3-4, 6-7. The Department referred to "a 'lesser included offense' in which the quantity of the controlled substance in question is not specified ...." *1986 Handbook*, at 8-9. The Handbook also "recommends" that to invoke penalties "based upon the *kind* and *quantity* of drug involved in particular offenses," prosecutors should allege and prove at trial drug type and amount. *Id.* at 20. The *1986 Handbook* distinguished *McMillan* as relating to a mandatory minimum provision expressly to be determined at sentencing. *Handbook* at 21. The government's understanding as demonstrated in the *1986 Handbook* is further persuasive evidence of Congress' determination to identify drug type and amount in § 841(b)(1) as offense elements. *Vazquez*, 271 F.3d at 110-11 (Becker, Ch J., concurring).

Despite its fundamentally sound analysis of drug type and amount as § 841 offense elements in the *1986 Handbook*, the Department of Justice seized upon the early post-*McMillan* sentence-enhancing fact cases and adopted and enforced a national policy to avoid juries and lower its burden of proof in drug cases.[16] Thus, the United States secured an erroneous unanimity throughout the courts of appeal without ever having the Court address whether Congress intended drug amount (and drug type) as offense elements.

Because allegations of drug quantity do not merely give notice of a potential sentence increase but actually constitute elements of a greater-inclusive offense, omission of those elements is fatal to any claim of judicial power to sentence beyond the maximum for the lesser offense actually alleged. This is persuasively demonstrated in the respondents' brief

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[16] *See United States v. Coy*, 19 F.3d 629 (11th Cir. 1994) (cross-appeal) *United States v. McCann*, 940 F.2d 1352 (10th Cir. 1991) (cross-appeal); *United States v. Moreno*, 899 F.2d 465 (6th Cir. 1990) (cross-appeal); *United States v. Jenkins*, 866 F.2d 331 (10th Cir. 1989) (mandamus); 18 U.S.C. § 3742(b) (prosecution of criminal appeals requires personal approval of the Attorney General, the Solicitor General, or the Solicitor General's designee); *United States Attorney's Manual* § 9-2.170(A)(1 & 3) (appeals and mandamus requires DOJ level approval). Petitioner continues to enforce the erroneous implied sentence-enhancing fact interpretation of § 841. *See, e.g., United States v. Rush*, 240 F.3d 729, 731 (8th Cir. 2001).

and those unquestioned authorities need not be discussed here. *See, e.g., Heflin v. United States*, 358 U.S. 415, 422 (1959); *Tinder v. United States*, 345 U.S. 565 (1953). On purely statutory grounds, regardless of *Apprendi*, the respondents' sentences are illegal and must be corrected.

II. Petitioner Endorses but Cannot Justify a Novel Approach Adopted by Most of the Courts of Appeals, Seeking to Evade the Choice Between Construing Threshold Drug Amounts as Elements of Different Offenses Under § 841(b) and Recognizing the Statute as Unconstitutional Under *Apprendi*.

A careful analysis of 21 U.S.C. § 841(b) shows that drug quantity, when made relevant by the statute as a basis for increased maximum sentences, is an element of the offense, because Congress intended it to be such. This interpretation saves the statute from being declared unconstitutional under *Apprendi v. New Jersey*, but the government resists it, perhaps fearing an avalanche of post-conviction petitions. *Cf. Bousley v. United States*, 523 U.S. 614 (1998). A large number of indictments, jury instructions, guilty plea colloquies, and sentences since the mid-1980s have been premised on the interpretation that drug quantity was only a "sentencing factor." That reliance was fostered by a successful government litigation campaign in all the circuits from 1986 - 1999. The circuits, with surprising near-unanimity, have now endorsed a new interpretation of the statute, compelled most say by the decision in *Apprendi*. Those cases, followed recently by the Second Circuit in *United States v. Thomas*, 274 F.3d 65 (2d Cir. 2001) (en banc), hold that *Apprendi*, as a matter of constitutional law, converted facts formerly construed as "sentencing factors," which the jury was forbidden to consider, into facts that, while not recognized as elements, were nonetheless to be treated "like elements." Those courts, endorsed by the petitioner here (Pet. Br. 15), thus view the problem as essentially procedural, rather than as involving the substantive constitutionality of the statute. This line of analysis is inconsistent with the actual decision and reasoning in *Apprendi*, and does not withstand scrutiny.

1. This Court in *Apprendi* applied the traditional doctrine of judicial review to *invalidate* a New Jersey statute that had been definitively construed to contain a sentence-enhancing

fact. *See Apprendi*, 530 U.S. at 468-69, 476, 491-92, 497. The Court reviewed the *statute* exposing the defendant to the enhanced sentence, rather than reviewing merely the particular *sentence imposed* and the procedures applied to impose it. *See id.* at 468 (the opinion begins, "A New Jersey statute ...."); *id.* at 469 (positing question presented in statutory terms); *id.* at 482 (addressing the "legislative scheme"); *id.* at 482-83, 483 n.10, 494, 495 (repeatedly addressing how the statute "exposes" defendants to an increased statutory maximum sentence).

This Court restated the controlling constitutional principle in statutory terms, consistent with the doctrine of judicial review: "[I]t is *unconstitutional for a legislature* to remove from the jury the assessment of facts that increase the prescribed range of penalties ...." *Id.* at 490 (emphasis added) (internal quotation marks and citations omitted). The Court ultimately articulated a substantive constitutional constraint on *legislative* power to define criminal offenses, and applied that constraint in a case in which the defendant had waived his trial rights, including the right to a jury trial, and pleaded guilty. *Id.* at 469-70. Simply put, *Apprendi* rendered statutes creating sentence-enhancing facts which are not elements unconstitutional *per se*. It did not invite judges to create a new, legislatively unauthorized system of jury-guided sentencing.

2. Here, petitioner nonetheless makes no attempt to construe § 841 to avoid the likely fatal conflict between the Constitution and Congress' (supposed) creation of § 841 threshold drug amounts as sentence-enhancing facts. *Cf. Castillo v. United States*, 530 U.S. 120, 123-24 (2000) (statutory choice between elements and implied sentence-enhancing facts is antecedent to constitutional analysis).

Rather, accepting the controlling circuit precedent in the court below, petitioner relies upon a new doctrine of constitutional adjudication articulated by some courts of appeals and supposedly based on *Apprendi*. This doctrine finds in *Apprendi* authority to *contradict* congressional intent to establish drug quantities as sentence-enhancing facts. This new doctrine would require that drug amount be alleged in the indictment and submitted to the jury, but only if the sentence later imposed exceeds the otherwise applicable statutory maximum. Pet. Br. at 15-16; *see United States v. Promise*, 255 F.3d 150, 156 (4th Cir. 2001) (en banc), *petition for cert. pending*, No. 01-6398 (docketed September 20, 2001)

(accepting preexisting construction that "Congress intended these specific threshold quantities to be sentencing factors rather than elements of aggravated drug trafficking offenses"); *id.* ("*Apprendi* dictates that in order to authorize the imposition of a sentence exceeding the maximum allowable without a jury finding of a specific threshold drug quantity, the specific threshold quantity must be treated as an element of an aggravated drug trafficking offense"); *id.* at 186 (Motz, J.) (concurring in, *inter alia*, Part II-A, dissenting from judgment).[17]

This new mode constitutional adjudication flies in the face of fundamental tenets of constitutional law and judicial review. Only Congress can define the elements of a federal offense. *Bousley v. United States*, 523 U.S. 614, 620-21 (1998); *Staples v. United States*, 511 U.S. 600, 604 (1994). A new constitutional decision by this Court in a state case cannot somehow convert what was not an element of a federal offense into an element.

A court may use avoidance of a constitutional problem as a tool of statutory construction,[18] but not as a justification to contradict legislative intent. If Congress intended drug type and amount to be sentencing factors, the courts must honor that intent in subjecting § 841 to judicial review. *See Miller v. French*, 530 U.S. 327, 339 (2000) (federal court "cannot press statutory construction 'to the point of disingenuous evasion' even to avoid a constitutional question"); *Hill v. Wallace*, 259 U.S. 44, 71 (1922) (Taft, Ch.J.) (severability analysis "does not give the court power to amend the act"). Judicial review is limited to upholding or striking down the provision enacted by Congress. *See United States v. Jackson*, 390 U.S. 570, 572-82 (1968) (voiding death penalty provision applicable

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[17]This constitutionally novel approach prevails, at least with respect to submission of threshold drug amounts to the jury and with immaterial linguistic variations, in every circuit except the Ninth Circuit. *See, e.g., United States v. Thomas*, 274 F.3d 655, 663 (2d Cir. 2001) (en banc); *United States v. Sanchez*, 269 F.3d 1250, 1265 & n.27 (11th Cir. 2001), *petition for cert. pending* No. 01-8100 (docketed Jan. 15, 2002); *id.* at 1267-70; *United States v. Vazquez*, 271 F.3d 93, 96 (3d Cir. 2001) (en banc) *petition for cert. pending*, No. 01-9014, docketed March 15, 2002); *id.* at 98-99; *United States v. Doggett*, 230 F.3d 160, 163-65 (5th Cir. 2000).

[18]See, *e.g., United States v. Lopez*, 514 U.S. 549, 562 (1995); *Ashwander v. Tennessee Valley Authority*, 297 U.S. 288, 348 (1936) (Brandeis, J., concurring); see also *Jones v. United States*, 526 U.S. 227, 239-40 (1999).

only to those exercising right to jury trial; rejecting Government's proposed extra-statutory procedural overlays). The *Promise-Thomas* approach, despite its apparently broad acceptance, flatly violates these fundamental principles. *Cf. Promise*, 255 F.3d at 165 (Wilkinson, Ch.J., concurring in part) ("The creation of new offense elements out of a statute's traditional sentencing factors works a serious infringement on the powers of a co-equal branch of government," and is "to the general detriment of popular governance").

3. The Ninth Circuit in *United States v. Buckland*, 277 F.3d 1173 (9th Cir. 2002) (en banc), reached essentially the same result by a path which is analytically inconsistent with the *Promise* approach. *See id.* at 1179 (declining request to "'sever' Congress's alleged intent from the statute and . . . fill the resulting void with the new procedure mandated by *Apprendi*"); *id.* at 1182 (overruling *United States v. Nordby*, 225 F.3d 1053 (9th Cir. 2000), its post-*Apprendi* analog to *Promise*). Instead, *Buckland* recognized the possibility that if Congress intended to create threshold drug amounts as sentence-enhancing facts, the statute would be unconstitutional under *Apprendi*. *Id.* at 1179. Expressly to avoid this outcome, the court construed the statute anew. *Id.* at 1179-82.

According to *Buckland*, § 841 does not run afoul of *Apprendi* because Congress did not expressly say judges must determine drug amount by a preponderance of the evidence. Instead, the court reasoned, Congress intentionally left the fact-finder and the burden of proof undefined, for courts to determine later. *Buckland*, 277 F.3d at 1179-80 (following *United States v. Brough*, 243 F.3d 1078 (7th Cir. 2001)). *Buckland* nonetheless declined to decide whether Congress intended threshold drug amounts to be "elements" or "sentencing factors," reading *Apprendi* to substitute an "effect" test in lieu of "semantical hair splitting" between elements and sentencing factors.[19] Finding that Congress intended "to ramp up the punishment for controlled substance offenders based upon the type and amount of illegal substance involved in the crime," *Buckland* held that

[19] *Brough* purported to determine that Congress maintained a distinction between "elements of the *offense*" and "the events . . . on which the prosecutor relies to establish maximum sentence." *Brough*, 243 F.3d at 1080 (emphasis original). This is nothing but evasion of *Apprendi*'s essence.

drug type and amount must be treated for purposes of allegation, proof and verdict like "any other material fact in a criminal case." *Id.* at 1182-83.

Buckland's whole-cloth statutory construction is deeply flawed. *Apprendi* holds unconstitutional any statute that would increase the maximum sentence without assuring the protections associated with elements. *Apprendi*, 530 U.S. at 494. At the same time, the Court's controlling *statutory* precedents pose a choice between construing a concededly maximum-extending fact in a federal criminal law as either an element or a sentencing factor. *Castillo*, 530 U.S. at 121 (2000) ("offense elements . . . or sentencing factors); *Jones v. United States*, 526 U.S. 227, 239 (2000) ("an element of an offense rather than a sentencing consideration").

In light of the choice posed, *Buckland*'s analysis is incomplete. On the one hand, *Buckland* rejects the primary basis upon which other courts rely for holding that drug amount is a sentence-enhancing fact. 577 F.3d at 1180 (holding that "unlawful acts" and "penalties" headings do not appear in the statute); *compare Promise*, 255 F.3d at 170-71 (Luttig, J., concurring) (basing statutory analysis on headings). Yet, *Buckland*, like *Brough*, never suggests another reason why drug type and amount should be considered anything but elements.

Buckland's determination that Congress deliberately intended to leave to the courts the allocation of the burden of proof and the identity of the fact-finder raises separate constitutional concerns:

> It is one thing [for a court] to fill a minor gap in a statute -- to extrapolate from its general design details that were inadvertently omitted. It is quite another thing to create from whole cloth a complex and completely novel procedure and thrust it upon unwilling defendants for the sole purpose of rescuing a statute from a charge of unconstitutionality.

Jackson, 390 U.S. at 580. Congress must define the contours of federal criminal offenses, *Bousley*, 523 U.S. at 620-21, and the courts cannot revise an allocation of authority between judge and jury which is explicit or implicit in a criminal statute. *Jackson*, 390 U.S. at 572-82 (rejecting government's attempt to save a statute through extra-statutory procedural overlays). While *Buckland* is correct that *United States v. Evans*, 333 U.S. 483 (1948), undermines any sentence-enhancing interpretation of drug amount, 577 F.3d at 1181,

Evans also defeats a construction based upon a specific congressional intent to leave the contours of § 841 for judicial determination. *See Evans*, 333 U.S. at 486 (Constitution limits the Court in supplying the undefined in criminal statutes).

One of the principal flaws of the statute in *Evans* was its ambiguity as to the allowable unit of prosecution. *Id.* at 490-91 (declining to resolve the "scope and quality of the forbidden acts" chargeable in each count because it "would be to proceed in an essentially legislative manner for the definition and specification of the criminal acts, in order to make a judicial determination of the scope and character of the penalty"). Drug type and amount are too intimately related to the allowable unit of prosecution to have been validly left to the courts for further definition. *Compare United States v. Grandison*, 783 F.2d 1152, 1156 (4th Cir. 1986) ("Congress intended the possession of each scheduled substance to be a different offense"), *with United States v. Edwards*, 105 F.3d 1179, 1181 (7th Cir. 1998) ("a controlled substance" is only element; drug types and amounts go to sentencing under the singular offense), *aff'd*, 523 U.S. 511 (1998).[20]

Because *Buckland's* statutory analysis is defective, and the *Promise-Thomas* aproach constitutes a judicial usurpation of legislative power, the Court should reject the petitioner's position and affirm the judgment of the Fourth Circuit on statutory grounds.

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[20]This Court's construction of § 841 is particularly needed to ameliorate an untenable situation not directly presented by this case. Due to a switch in the courts of appeals after *McMillan v. Pennsylvania*, 477 U.S. 79 (1986), from construing drug type as an element to construing it as a sentence-enhancing fact, there are individuals now serving extended sentences because drug type *is* an offense element, *see United States v. Richardson*, 86 F.3d 1537, 1552-53 (10th Cir. 1996) (collecting cases), *cert. denied*, 519 U.S. 1030 (1996), and others now serving extended sentences because it *is not* an element. *See, e.g., Lewis*, 113 F.3d at 489-92.

III. The Holding in *Neder v. United States*, 527 U.S. 1 (1999), Cannot Be Extended to Allow a Court of Appeals to Decide that the Evidence at Trial or Sentencing Was Sufficient to Render "Harmless" the Defendant's Conviction and Life Sentence for a Level of Offense Not Charged in the Indictment or Presented at Trial.

Petitioner proposes to extend *Neder v. United States*, 527 U.S. 1 (1999), to the context of drug amount omitted from the indictment in a controlled substances case. Pet. Br. at 18-22. In this attempt, petitioner affirmatively, if subtly, relies upon *Neder* to gloss over the barely acknowledged, additional problem in this case that drug amount was not included in the instructions to the petit jury. Pet. Br. at 20-21; *see also id.* at 23-24. There are, however, fundamental differences between the context in which the new appellate interpretation of materiality as an offense element for jury determination in *Neder* applied and the context in which the new appellate interpretation of drug amount as an offense-distinguishing element applies. Petitioner's reliance upon *Neder* is misplaced with respect to both the omitted instruction to the petit jury and the omitted allegation in the indictment.

The change in law *Neder* addressed—from materiality as a "legal element" to an ordinary offense element—occurred in a unique procedural context. *See Neder*, 527 U.S. at 14 ("this case arose in the legal equivalent of a laboratory test tube"). At the time of trial in *Neder*, materiality concededly was an offense element. *Neder*, 527 U.S. at 8; *Johnson v. United States*, 520 U.S. 461, 464 (1997); *United States v. Gaudin*, 515 U.S. 506, 509 (1995). Widespread precedent had held, however, that it was a "legal" element, to be decided by the judge rather than the jury. *Gaudin*, 515 U.S. at 516-21. Nonetheless, the prosecution still offered evidence *at trial* to prove the element. *See Neder*, 527 U.S. at 16 (evidence of $5 million in unreported income); *Johnson*, 520 U.S. at 464 (noting defendant's unsuccessful objection to proof of materiality during the trial); *Gaudin*, 515 U.S. at 508 (prosecutor presented trial testimony on materiality). The district court in *Neder* determined the legal element of materiality under a beyond-a-reasonable-doubt standard. *See Neder*, 527 U.S. at 9 ("Neder was tried . . . under the correct standard of proof"); *cf. Gaudin*, 515 U.S. at 510 n.1 (some

courts did not require beyond-a-reasonable-doubt standard for legal elements). The materiality element constituted a necessary part of the verdict of guilt. *Johnson*, 520 U.S. at 464 (district court included binding instructions on materiality in jury charge); *Gaudin*, 515 U.S. at 508 (same); *Neder*, 527 U.S. at 6 (district court instructed that materiality on tax and bank fraud charges, although alleged, were not jury questions; the court separately found at trial that materiality had been proved).[21] In *Neder*, the *only* difference between the district court's erroneous "legal elements" interpretation and the interpretation adopted on appeal was that under the legal elements theory the jury did not decide materiality the judge did.

Once the correct construction of this statute is recognized, neither the error in the sentence nor the "error" in the indictment and jury charge can be excused under *Neder*. The present case occurred in a vastly different procedural context. At the time of trial, unanimous circuit precedent construed drug amount as a "sentencing factor." Pet. Br. at 15, 48. The defendant could not successfully defend at trial against a finding of a threshold statutory drug amount because it was a matter for the district court at sentencing, not a trial issue at all—let alone one for the jury. *See, e.g.*, *United States v. Moreno*, 899 F.2d 465, 472-74 (6th Cir. 1990) (jury conviction on lesser-included drug amount, and acquittal of a greater-inclusive amount, does not constrain a district court's *statutory* drug amount determinations for sentencing).[22] Thus, statutory threshold drug amount formed no part of the offense of conviction. *See, e.g.*, *United States*

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[21] In *Neder*, the Court limited its discussion of structural error, and its application of harmless-error review, to materiality under the tax fraud charge. *Id.* at 8, 15-20. As the Court remanded the remaining counts to the court of appeals for consideration of whether the instructions were harmless, *id.* at 25, the Court never addressed whether the district court's erroneous holding that materiality constituted no form of element for wire and mail fraud offenses was distinguishable from its erroneous construction of materiality under the tax fraud count for purposes of structural-error and harmless-error analysis.

[22] *See also United States v. Castaneda*, 9 F.3d 761, 769-70 (9th Cir. 1993)(reversible error for the district court to consider itself bound at sentencing by jury *statutory* drug amount finding); *United States v. Chapple*, 985 F.2d 729, 731 (3d Cir. 1993) (same); *United States v. Jacobo*, 934 F.2d 411, 416-18 (2d Cir. 1991) (same).

v. Edwards, 105 F.3d 1179, 1181 (7th Cir.) ("a controlled substance" is the element; drug types and amounts go to sentencing under the singular offense), *aff'd on other grounds*, 523 U.S. 511 (1998). At sentencing, the burden of proof was a mere preponderance of the evidence. *See United States v. Watts*, 519 U.S. 148, 156 (1997).

With threshold drug amounts determined to be offense elements, the wrong decision-maker not only made the decision, but made it under a reduced standard of proof, at the wrong time; the then-prevailing adjudicatory framework was completely different from, and inconsistent with, the one Congress intended.

In *Cole v. Arkansas*, 333 U.S. 196 (1948) (*Cole I*), this Court established that an appellate court could not affirm a sentence for one offense based upon an appellate conclusion that the record established the defendants were guilty of a distinct, related offense. Rather, due process requires that a defendant be *both* charged *and* tried and convicted of a particular offense before any court may render or affirm a judgment based upon it.

Cole I implicated three related statutory offenses under an Arkansas strike-violence law. The *Cole* petitioners' co-defendant was convicted of an offense under § 2 of the law defined as acting in concert with another, assembling where a labor dispute existed and using violence to prevent a person from lawfully working. *Id.* at 198; *see also Cole v. Arkansas*, 338 U.S. 345, 346 (1949) (*Cole II*). Petitioners themselves were convicted of a distinct offense under § 2 of the law, defined as acting in concert with another to promote, encourage or aid "any such unlawful assemblage" (referring to the assemblage defined in the other § 2 offense). *Cole I*, 333 U.S. at 197-98. The Arkansas supreme court affirmed on the ground that the information had charged and evidence showed defendants committed a distinct, related offense under a different section: § 1 of the law, defined as using violence or threatening violence to prevent or attempt to prevent a person from lawfully working. *Id.* at 198, 199-20 & n. 2.

The Court determined that the jury charge did not include a finding on the use or threat of violence element of § 1. *Id.*

at 199.[23] But the Court acknowledged that, on appeal, the state supreme court held that the charge in the language of § 2 alleged the actual use of violence (necessary for a conviction under § 1). *Id.* at 200, 201. The Court nonetheless held that the course of proceedings violated due process:

> If, as the State Supreme Court held, petitioners were charged with a violation of § 1, it is *doubtful* both that the information fairly informed them of that charge and that they sought to defend themselves against such a charge; *it is certain that they were not tried for or found guilty of it*. It is as much a violation of due process to send an accused to prison following conviction of a charge on which he was never tried as it would be to convict him upon a charge that was never made.

Id. at 201 (emphasis added). The Court therefore reversed and remanded to the state courts for further proceedings. *Id.* at 202.

After the Arkansas Supreme Court affirmed the petitioners' convictions on remand, the case returned to the Court. *Cole II*, 338 U.S. at 347. The "more subtle and far-reaching" concern in *Cole II* was that "the trial court and the appellate court adopted contrasting interpretations of . . . section [2]. . . ." *Id.* at 348. In the face of a serious constitutional challenge to the aiding-an-assemblage offense in § 2, the state supreme court had construed § 2 to require the accused to aid the assemblage with the *intent* that violence be used. *Id.* at 348-49. The petitioners objected that the intent requirement had been newly added on appeal, because they had been convicted upon instructions permitting conviction for mere presence at an assemblage where unlawful violence occurred. *Id.* at 349. The Court stated that, were this so, "the result [on remand] was a repetition of the earlier error." *Id.* at 348. The Court, however, concluded from the trial record that the petitioners in fact had been properly tried

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[23]The Court found further support that a § 2 offense, not a § 1 offense, was submitted to the jury because an unlawful assemblage, submitted to the jury, was not a § 1 offense element. *Id.* Submission of this element, of course, would not have precluded submission of all § 1 offense elements. *Cf. Blockburger v. United States*, 284 U.S. 299, 302 (1932) (elements test for "same offense").

and convicted for the alleged § 2 offense, including the intent element, and affirmed.

With drug amount as an offense-defining element, *Cole I* requires the conclusion that extending *Neder* to this case would violate due process.[24] Just as the element of actual violence in *Cole I* defined the related § 1 offense and was not submitted to the jury, the agreement here to threshold drug amounts defined a related but uncharged conspiracy offense under 21 U.S.C. § 846 and was not submitted to the jury.[25]

The rule in *Cole II*, that an appellate court cannot add an element to a crime to save a statute and affirm a judgment based upon the element added on appeal, survives *Neder*, illustrates the special circumstances underlying *Neder*'s rule, and cautions against injudicious extensions of the *Neder* holding. The defendant in *Neder*, despite the reservation of the "legal element" to the judge, was charged and tried (if not properly convicted) under the *same elements* upon which the Court affirmed. *Neder*, 527 U.S. at 9. The "legal element" construction rejected on appeal in *Neder*, like an instruction erroneously describing an element at the conclusion of the trial, involved error limited to the jury instructions alone, without any collateral impact on the issues at stake at trial, the burden of proof, or the incentives of trial participants. *See Neder*, 527 U.S. at 9-10; *id.* at 11-13. Moreover, the trial record created under the burden of proof applicable to elements can support an inference on appeal *from the trial record* that the defendant contested and presented such evidence as he

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[24]This Court has repeatedly applied *Cole I*'s rule that an appellate court violates due process by affirming a judgment based upon an offense theory or set of facts for which the appellant was not charged, tried and convicted. *McCormick v. United States*, 500 U.S. 257 (1991) (untried legal and factual grounds cannot support conviction); *Chiarella v. United States*, 445 U.S. 222, 237 n.21 (1980) (different legal theory); *Dunn v. United States*, 442 U.S. 100 (1979) (unindicted and untried perjuries cannot support conviction); *Presnell v. Georgia*, 439 U.S. 14 (1978) (untried aggravating factor cannot support death sentence); *Eaton v. City of Tulsa*, 415 U.S. 697 (1974) (uncharged and untried acts of contempt cannot support conviction); *Garner v. Louisiana*, 368 U.S. 157, 164 (1961) (uncharged and untried criminal trespass offense cannot support sentence).

[25]When an element distinguishes between offenses, a defendant has no incentive to object—indeed, every incentive not to object—that the indictment or the jury instructions fails to expose him to a more serious charge.

could, or would on retrial. *Cf. id.* at 19 ("defendant did not, and apparently could not, bring forth facts contesting the omitted element").

In contrast, adding an element on appeal that was never at issue in the trial alters, after the fact, the very framework of the trial. Here, the unanimous circuit precedent construing drug amount as a sentence-enhancing fact and not an element affirmatively establishes that defendants received *no relevant notice* that they must, or even could, contest drug amount at trial, *even when drug amount was alleged* as it was here in the original, superseded indictment. *Cf.* Pet. Br. at 24. Moreover, any inference on appeal from the record necessarily would be unsupported judicial speculation as to what choices defendants would have made, with notice, under an *increased* prosecutorial burden of proof at trial and under a completely different adjudicatory framework. *Cf.* Pet. Br. at 19 (relying on *Neder* review of trial evidence); *id.* at 24 (contending that *sentencing evidence* can establish probable cause for indictment).[26] As in *Cole I* and *Cole II* (potentially), the change in interpretation in this case involved additional, pervasive errors defeating notice and the opportunity to be heard, as well as a record inadequate for appellate review. Thus, extending *Neder* to this case to affirm a sentence based upon an uncharged and untried aggravated offense would validate structural error and, independently, violate due process.[27]

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[26]Petitioner, without supporting authority, asks the Court to include sentencing evidence in the "entire record" to be reviewed, Pet. Br. at 23, 45 n.14, implicitly conceding the absence of *relevant* notice and consequently the review-defying inadequacies in the trial record.

[27]Because petitioner's attempt to extend *Neder* to uncharged and untried greater-inclusive drug offenses fails despite the utter fiction, necessary to invoke *Neder* in the first place, that the error in this case is the "omission" from the indictment and the jury charge of the greater-inclusive offenses, *see United State v. Vazquez*, 271 F.3d 93, 101-02 (3d Cir. 2001) (en banc), the Court should not perpetuate the fiction. The error in the respondents' cases is simply a classic illegal sentence. If Rule 52 applies to illegal sentences at all, such sentences surely affect substantial rights, *see Glover v. United States*, 521 U.S. 198 (2001), and affirming the sentences would necessarily affect "the fairness, integrity or reputation of judicial proceedings," *United States v. Olano*, 507 U.S. 725, 734 (1993), because it would constitute an independent violation of due process. *Cole I*, 333 U.S. at 201. The plain error rule must look to the "reputation" of the proceedings among persons who are well-versed in constitutional values.

CONCLUSION

Amici acknowledge that the stakes in this case are potentially very high; under any standard of review, the fairness, integrity and public reputation of judicial proceedings are directly at stake. *Amici* submit that those interests will be best secured by enforcing Congress' intent that drug threshold amounts (and drug types) be § 841(b) offense elements, notwithstanding the burden the lower courts may now face due to their previous failure to do so.

For the foregoing reasons, as well as those advanced in the briefs of the respondents, NACDL and FAMM support respondents in seeking affirmance of the judgment below vacating their illegal sentences.

Respectfully submitted,

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